Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALAN D. TUCKER,

Petitioner,

vs.

GEORGIA DEPARTMENT OF HUMAN RESOURCES
EX. REL., DANIEL CASSEL,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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62 pp

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the Supreme Court of the State of Georgia entered in the action on December 3, 1993, which denied the Petitioner's Motion For Reconsideration of the Supreme Court's denial of his Petition for Certiorari.

QUESTIONS PRESENTED FOR REVIEW

(1)

Whether Official Code of Georgia Annotated Section 19-7-45 violates the Due Process and Equal Protection Clauses of the Constitution of the United States and should be held to be unconstitutional because it requires the Trial Court to discriminate against males who have been sued by the State of Georgia in paternity actions by removing from the Trial Court

its discretion and ability to objectively review the pending facts and circumstances in the matter solely because the Petitioner was being sued by the State of Georgia Department of Human Resources?

(2)

Whether the Equal Protection Clause of the United States Constitution forbids the State of Georgia from exercising its peremptory strikes to exclude persons from a civil petit jury solely because of their gender on the assumption that members of that gender will be unable to impartially consider the case to be tried?

PARTIES TO THE PROCEEDING

Petitioner, Alan D. Tucker, was the only appellant below. The Appellee was the Georgia Department of Human Resources, Ex. Rel., Daniel Cassel.

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Petition For Writ Of Certiorari
To The Supreme Court Of The
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PETITION FOR WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

The decision of the Supreme Court of the State of Georgia is unreported, however, a copy of the order denying the Appellant's Motion For Reconsideration is attached hereto as Appendix A-29. The decision of the Superior Court of Glynn County, State of Georgia is unreported, however, a copy of the order is attached hereto as Appendix A-6 and A-10.

JURISDICTIION

The jurisdiction of this Court is invoked pursuant to 28 United States Code Section 1257(a). The judgment of the Supreme Court of the State of Georgia was entered on October 5, 1993. The order of the Supreme Court of the State of Georgia denying the Appellant's Motion For Reconsideration was December 3, 1993. This Petition is timely filed within ninety days thereafter.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection and Due Process Clauses of the Fifth Amendment and Fourth Amendment to the United States Constitution which read:

> "...[N]or be deprived of life, liberty, or property, without due process of law..."
>
> and

"...[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

STATEMENT OF THE CASE

On January 9, 1990, Petitioner went to the local office of his family doctor, Dr. Carl M. Drury, M.D., to have a vasectomy performed.

On February 6, 199 , Dr. Drury examined a sperm sample of the Petitioner's seminal fluid and determined that the Petitioner was sterile and that it was thereafter impossible for the Petitioner to father any children.

Petitioner and his wife, Elise Tucker, separated in April of 1990, and were divorced on May 24, 1990. During the period of separation, the Petitioner lived at the Riverwatch Inn in Unit 405A. The Petitioner began renting Unit 405A on April 28, 1990, and resided there until September 28, 1990. On September 26, 1990, the Petitioner moved from Unit 405A to his home located at 160 Pierce Butler Drive, St. Simons Island,

Georgia.

On November 27, 1990, Sonja Cassel, the mother of Daniel Cassel, went to the medical office of Gowen, Dohn, Norvell, Ellenburg and Johnston. She was given a pregnancy test which revealed that she was pregnant. Ms. Cassel informed her doctor on November 27, 1990, that her last monthly period was on August 24, 1990, and the doctor calculated her expected delivery date (EDC) to be May 30, 1991. Ms. Cassel left the doctor's office and went to the local Department of Family and Children's Services where she applied for welfare and public assistance. She informed DFACS that she was three months pregnant. She also quit her job, and went to her father's home in Alabama.

On January 18, 1991, Dr. Norvell conducted a sonogram on Ms. Cassel to establish the age of the fetus because

Ms. Cassel's uterus was smaller than her dates indicated. A sonogram was also used to calculate the date of conception. On January 18, 1991, the estimated fetal age was 13 weeks, 6 days old, which meant her date of conception was October 27, 1990.

On April 12, 1991, Dr. Norvell conducted another sonogram on Ms. Cassel that indicated the fetal age was 26 weeks 2 days old, which made Ms. Cassel's date of conception to be October 24, 1990. Daniel Cassel was born July 26, 1991. He was a normal term baby with no signs that he was premature. The baby was noted at the time of delivery to have some meconium which further indicated that he was at least full term if not a few days past the due date.

Sonja Cassel became pregnant within a week of October 24 - 27, 1990. She did not get pregnant from any alleged sexual

intercourse with the Petitioner that occurred on or after November 17, 1990, or before September 28, 1990. Ms. Cassel testified that she did not have any sexual intercourse with the Petitioner after July, 1990, and only one time in November on, or about, November 17, 1990, and that it was a week after November 10 -- the Petitioner's Birthday -- when she became pregnant.

In December, 1991, the Georgia Department of Human Resources wrote to the Petitioner, a Brunswick attorney, advising him that one Sonja Cassel had named him as the putative father of a minor child, Daniel Cassel, and requesting reimbursement for money paid for the support of said child.

On December 13, 1991, Dr. Carl Drury conducted another examination of the Petitioner's seminal fluid and determined that the Petitioner was still sterile and

unable to father any children.

The Petitioner met with the State's representative at the appointed time on December 17, 1991, denied he was the father of the child, and furnished the State a doctor's medical affidavit signed by Dr. Carl M. Drury certifying that the Petitioner was and had been sterile since February 6, 1990, and medically could not possibly be the father of the child. The State, disregarding the medical certificate, filed the within action against the Petitioner on December 18, 1991, in the Superior Court of Glynn County, Georgia, under Official Code of Georgia Annotated Section 19-11-33 seeking recovery of the support money previously paid for the child, and filing a motion for blood and DNA testing.

On January 15, 1992, Judge A. Blenn Taylor, Jr., granted the Department of Human Resources Motion for a blood test

under Official Code of Georgia Annotated Section 19-7-45. On February 7, 1992 the Petitioner's Motion for Reconsideration was denied by Judge Taylor. The Petitioner filed an Application for Interlocutory Appeal with the Supreme Court for the State of Georgia on the 29th day of January, 1992, wherein Petitioner challenged the constitutionality of O.C.G.A. Section 19-7-45 as a violation of his rights under the Equal Protection Clause and a denial of his rights under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution.

On February 19, 1992, the Supreme Court of the State of Georgia denied the Petitioner's "Application for Interlocutory Appeal" with Judge Benham dissenting. The Petitioner was thereafter required to submit to the blood

test.

Prior to jury selection, counsel for the Petitioner challenged the array and makeup of the jury panel. (T.5,10-12). The challenge was based upon the statistical and actual disparity of the jury panel with the actual population of Glynn County, Georgia. According to the jury list dated March 8, 1993, the initial list of 125 jurors contained 43 percent males and 57 percent females. After the jury list was printed, and prior to jury voir dire, there were an additional 9 male jurors excused which further reduced the statistical gender makeup of the panel to only 36 percent potential male jurors.

During general voir dire, Juror Scott Tarplee, and Juror Terry Dickson were excused for cause by the Court. After voir dire was completed, the State struck 5 other male jurors from the

panel. The jury selected for trial consisted of 8 females and 4 males. Counsel for the Petitioner renewed his objection to the array and the panel, and further objected to the State's use of its peremptory strikes to strike almost all males from the array. (T.39).

A jury trial resulted in a verdict against the State in its action for the recovery of the support money previously paid and an inconsistent finding of the Petitioner being the father of the child with an award of future monthly child support.

On May 25, 1993, Petitioner filed an "Application for Discretionary Appeal" pursuant to O.C.G.A. Section 5-6-35 in the Court of Appeals of the State of Georgia and the Supreme Court of the State of Georgia wherein the federal questions sought to be reviewed were again raised. The Supreme Court of

Georgia dismissed the Petitioner's Application for Discretionary Appeal on June 4, 1993. The Court of Appeals of Georgia denied the Application for Discretionary Appeal on June 17, 1993, and denied the Petitioner's Motion for Reconsideration on July 2, 1993.

The Petitioner filed a "Petition For Certiorari" with the Supreme Court of the State of Georgia on July 22, 1993, wherein the Petitioner again raised the federal questions sought to be reviewed. The Supreme Court of Georgia denied the Petitioner's Petition For Certiorari on October 5, 1993. The Petitioner filed a "Motion For Reconsideration" which was denied October 28, 1993, and a "Second Motion For Reconsideration" which was denied by the Supreme Court of Georgia on December 3, 1993. The Petitioner respectfully seeks a review of the decision of the Supreme Court of Georgia

which denied the Petitioner's Second Motion For Reconsideration. Neither the Court of Appeals of Georgia nor the Supreme Court of Georgia, rendered a written opinion explaining their reasons for denying the Appeals of the Petitioner.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS TWO IMPORTANT QUESTIONS. THE FIRST CONCERNS WHETHER THE OFFICIAL CODE OF GEORGIA ANNOTATED SECTION 19-7-45 VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE CONSTITUTION OF THE UNITED STATES AND SHOULD BE HELD TO BE UNCONSTITUTIONAL BECAUSE IT REQUIRES THE TRIAL COURT TO DISCRIMINATE AGAINST MALES WHO HAVE BEEN SUED BY THE STATE OF GEORGIA IN PATERNITY ACTIONS BY REMOVING FROM THE TRIAL COURT ITS DISCRETION AND ABILITY TO OBJECTIVELY REVIEW THE PENDING FACTS AND CIRCUMSTANCES IN THE MATTER SOLELY BECAUSE THE PETITIONER WAS BEING SUED BY THE STATE OF GEORGIA DEPARTMENT OF HUMAN RESOURCES?

THE SECOND CONCERNS WHETHER THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION FORBIDS THE STATE OF GEORGIA FROM EXERCISING ITS PEREMPTORY STRIKES TO EXCLUDE PERSONS FROM A CIVIL PETIT JURY SOLELY BECAUSE OF THEIR GENDER ON THE ASSUMPTION THAT MEMBERS OF THAT GENDER WILL BE UNABLE TO IMPARTIALLY CONSIDER THE CASE TO BE TRIED?

ARGUMENT AND CITATION OF AUTHORITIES

1

O.C.G.A. Section 19-7-45 provides: "As soon as practicable after an action has been brought, the Court, upon motion of the petitioner, the respondent, or any other interested party, may order the mother, the alleged father, and the child to submit to any blood tests, including human leukocyte antigen (HLA) testing and genetic testing if available, which have been developed or established for purposes of disproving or proving parentage and which are reasonably accessible. In cases in which the Department of Human Resources is the petitioner, pursuant to paragraph (4) of subsection (a) of Code Section 19-7-43, the Court shall upon motion of any party to the action order the mother, the alleged father, and the child to submit to such blood tests. If the Court orders

the blood tests and if the action is brought prior to the birth of the child, the Court shall order the blood tests made as soon as medically feasible after the birth. The tests shall be performed by a duly qualified licensed practicing physician, duly qualified immunologist, or other qualified person. Upon motion by a party, the Court may order that independent tests be performed by other experts qualified as examiners of blood types. In all cases, however, the Court shall determine the number and qualifications of experts. In all cases the results shall be made known to all parties at interest as soon as available. An order issued under this Code Section is enforceable by contempt, provided that if the petitioner refuses to submit to an order for a blood test, the Court may dismiss the action upon motion of the respondent."

O.C.G.A. Section 19-7-45 violates the Due Process and Equal Protection Clauses of the Constitution of the United States and of the State of Georgia in that it provides the Trial Court with discriminatory and alternative standards which completely remove any and all discretion from the Trial Court. In particular, said statute requires a different system of evidence and procedures for different classes of males in that with respect to certain paternity actions, it is within the discretion of the Trial Court to order a mother, a father or a child to submit to a blood test. However, in actions in which the Department of Human Resources is the petitioner, under O.C.G.A. Section 19-7-43(a)(4), the Trial Court's discretion is removed and it is mandatory that the Trial Court order such blood tests. Such inconsistency under the law provides a

dual system of justice and procedure depending upon who is the Plaintiff. In other words, if a mother, individually, employs an attorney and files a paternity action, the Trial Judge has the discretion as to whether or not to order a blood test upon motion of either of the parties. However, when the State Department of Human Resources employs an attorney to file a paternity action, such discretion is totally removed from the Court. The actions are identical in all other aspects, except for the criteria as to whether the mother of a child elects to employ the Department of Human Resources and use its attorney to prosecute the action, as opposed to employing private counsel. Such inconsistent classification of the laws and procedure violates the due process and equal protection rights of defendants and alleged putative fathers in said

cases and is unconstitutional on its face.

Prior to the State's motion for a blood test, the Petitioner provided the Trial Court with sworn statements and medical records which in and of themselves proved that the Petitioner could not be the father of the minor child, Daniel Cassel. Dr. Drury substantiated the Petitioner's vasectomy, his sterility, and his inability to father any children after February, 1990. Sonja Cassel's medical records proved that she became pregnant in October of 1990, even though she asserted in her deposition and later at trial, that she had sexual intercourse with the Petitioner only on one occasion, a week or so after November 10, 1990, and no intercourse with the Petitioner during the months of September and October, 1990.

O.C.G.A. Section 19-7-45 removed from the Trial Court its discretion and ability to objectively review the pending facts and circumstances in the matter solely because the Petitioner was being sued by the Department of Human Resources. Said section clearly violates the due process and equal protection clauses of the Constitution of the United States and should be held to be unconstitutional because it requires the Trial Court to discriminate against males who have been sued by the State in paternity actions. If the Petitioner had merely been sued in a paternity action which involved parties with private counsel, the Court would have been allowed to review the evidence at the time a motion for a blood test was made and then decided whether there existed sufficient cause and justification to require the Petitioner to submit to such

testing. Unfortunately, in cases where the State sues the alleged father, the Courts have no discretion to review any evidence, medical or otherwise, which results in the violation of the Petitioner's Constitutional Rights to equal protection and due process under the United States Constitution.

2

The Petitioner established a prima facie case of gender based discrimination in violation of the Equal Protection Clause of the Constitution of the United States by showing that the State used 5 of its 6 peremptory strikes against males in a paternity case which by its very nature pitted woman against man. The State used 83% of its strikes to remove 56% of the males from the jury, thereby significantly diminishing the male representation of the jury.

If this case was concerned with race

instead of gender, there would be no question that the Petitioner has clearly established a strong prima facie case of discrimination. The result should be no different because the discrimination was gender based. The affect of the discriminatory use of its strikes by the State to exclude members of the jury resulted in a "grossly disproportionate exclusion" of males in violation of the Equal Protection Clause of the Constitution.

Batson v. Kentucky, 106 S.Ct. 1712, 1723, 90 L.Ed 2d 69 (1986), holds that the Equal Protection Clause of the United States Constitution guarantees that peremptory strikes will not be used to exclude persons from a jury because of race on the assumption that members of that race will be unable to consider impartially the case to be tried. Edmondson v. Leesville Concrete Co. Inc.,

500 U.S.____, 111 S.Ct. 2077, 114 L.Ed 2d 660 (1991), has held that Batson, applies to civil litigants as well. In United States v. DeGross, 960 F.2d 1433 (9th Cir. 1992), the Court held that the Fifth Amendment's equal protection principles prohibited the use of peremptory strikes to exclude venirepersons on the basis of gender. Under Batson, once a prima facie case has been established by a party belonging to a cognizable racial group, the opposite party then has the burden to "Articulate a neutral explanation, related to the particular case to be tried" as to why it struck members of the jury who were in the cognizable group.

American society is made up of many different races, cultures, and economic backgrounds. Depending upon the geographic location, the makeup of the population varies drastically as to the

percentage of racial, cultural, and economic factors. The one factor that doesn't vary is the percentage of males and females throughout the various geographic regions. Sexual discrimination is now readily recognizable and properly forbidden in the workplace, the welfare system, the political system, etc... It should likewise be disallowed in the judicial system when litigants are seeking a fair and impartial jury to decide an issue that directs the sexes onto an often volatile collision course -- the issue of paternity.

Gender based discrimination which excludes men or women from the jury solely because of their sex due to the assumption that members of that sex will be unable to consider impartially the case to be tried, violates the Equal Protection Clause with no less significance than racial discrimination.

The results of gender discrimination are the same as those from racial discrimination, in that they preclude or prevent the party who is a member of the cognizable group from obtaining a fair trial from a fair and impartial jury.

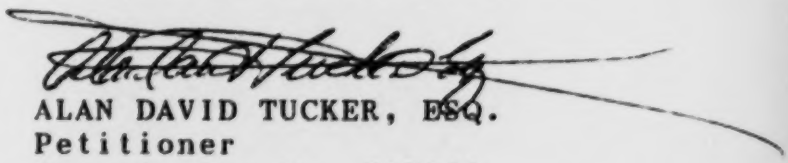
Once the Petitioner established a prima facie case of gender based discrimination in violation of the Equal Protection Clause, the Trial Court had a duty to determine if the State had an explanation which justified its use of its peremptory strikes in the manner so alleged. The Trial Court merely "noted" the objection in the present case and then moved on. No hearing was ever held to determine the basis of the State's use of its strikes. The failure of the Trial Court to conduct such a hearing was reversible error.

CONCLUSION

For all of the reasons set forth herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the Supreme Court of the State of Georgia.

Dated: Brunswick, Georgia
February 28, 1994

Respectfully submitted,



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APPENDIX

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

GEORGIA DEPARTMENT OF HUMAN RESOURCES, EX.REL. DANIEL CASSEL,	$	CIVIL ACTION NO. 91-02151
Plaintiff,	$	
VS.	$	
ALAN D. TUCKER,	$	
Defendant.	$	

1.

OBJECTION AND OPPOSITION TO MOTION FOR ORDER COMPELLING BLOOD TESTS

COMES NOW the Defendant and hereby files his objection to the motion filed by the Plaintiff seeking a blood test and in support thereof, shows as follows:

1.

O.C.G.A. Section 19-7-45 violates the due process and equal protection clauses of the Constitution of the United States and of the State of Georgia in that it provides for disproportionate and alternate standards removing discretion

from the Court. In particular, said statute provides for a dual system of evidence and procedures for different classes of people in that with respect to certain actions, it is within the discretion of the trial court to order a mother, a father or a child to submit to a blood test. However, in cases in which the Department of Human Resources is a petitioner, under O.C.G.A. Section 19-7-43(a)(4), this discretion is removed from the Court and it is mandatory that the Court order such blood tests. Such inconsistency under the law provides a dual system of justice and procedure depending upon who is the petitioner. In other words, if a mother, individually, employs an attorney and files such an action, the Judge has the discretion as to whether or not to order a blood test upon motion of any of the parties. However, when an attorney employed by the

State Department of Human Resources or a welfare recipient employs such attorney to file an action, this discretion is removed from the Court. The action is identical in all other aspects except for the criteria as to whether the Plaintiff elects to employ the Child Support Recovery Unit to use their attorney to prosecute the action, as opposed to private counsel. Such inconsistent classification of the laws and procedure violates the due process and equal protection rights of defendants and alleged putative fathers in said cases.

2.

Attached to the Defendant's Answer are the Affidavits of the Defendant and two (2) Affidavits of Carl M. Drury, M.D. certifying that the Defendant in this case is sterile, is and was medically incapable of fathering the child and that

the examinations and tests performed by Dr. Drury are the highest standard of testing or evidence available and a blood test would be absolutely meaningless.

3.

A blood test is moot under the facts and circumstances of this case because irrespective of the outcome of a blood test, such a blood test is only a statistic probability or percentage of probability and, as a matter of law, is not and cannot be conclusive to establish or not establish paternity.

4.

There is no need or necessity for a blood test under the circumstances because irrespective of the outcome of the results, it is moot, immaterial and irrelevant because, medically, it is impossible for the Defendant to be the father of the child in this case.

5.

It would be a total abuse of this Court's discretion to order a blood test under O.C.G.A. Section 19-7-43.

6.

The Plaintiff in this case has failed to comply with O.C.G.A. Section 19-7-44.

WHEREFORE, your Defendant respectfully moves that the blood test ordered be denied and this court dismiss the Petition.

HUTTO, PALMATARY & MAGDA, P.A.

BY: s/s: G. Carroll Palmatary

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IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

GEORGIA DEPARTMENT OF
HUMAN RESOURCES, EX. REL.
DANIEL CASSEL,

Plaintiff,

vs. CIVIL ACTION NO.
91-02151

ALAN D. TUCKER,

Defendant.

ORDER

This case having come before the Court on Plaintiff's motion for a blood test under O.C.G.A. Section 19-7-45, and argument of counsel on said motion having been heard and considered, said motion is hereby GRANTED.

Defendant challenges the provisions of the aforementioned statute, on the grounds that in paternity cases filed by by private litigants, the Court has discretion in the matter of blood tests, while in cases filed by the Department of Human Resources, a request for a blood

test must be honored. Requiring a litigant to submit to a blood test in a civil paternity action violates no constitutionally protected rights. Raines v. White, 248 Ga. 406 (1981). The Court finds that the statutory distinction between cases brought by the State agency and cases brought by private parties has a rational relationship to legitimate state interests. Paternity suits brought by private parties may be motivated by reasons other than those contemplated by the paternity determination statute, while the participation of the State agency can reasonably be expected to prevent abusive paternity complaints. In addition, a requirement that a blood test can be obtained, as a matter of right, by any party in a paternity complaint filed by the State assists in ensuring fairness to persons who must litigate against the State. If

the State could pursue paternity complaints while refusing to agree to blood tests which might terminate the proceeding at an early stage, defendants would be required to oppose the State and all of its litigation resources in cases when that could be unnecessary. These factors justify the statutory distinction between State-initiated paternity actions and paternity actions filed by private parties.

In the absence of a showing that the minor child has a medical condition that would make submission to a blood test an unacceptable risk, the absence of a guardian ad litem as of the time of the hearing on the motion for a blood test will not be found to bar the granting of that motion. However, the State is directed to seek the appointment of a guardian for the minor child, and the blood test shall not be conducted until

at least ten days after the guardian accepts the appointment, to provide the guardian with an opportunity to seek reconsideration of the ruling on said motion.

This 15th day of January, 1992.

s/s A. Blenn Taylor, Jr.
A. Blenn Taylor, Jr.
Judge, Superior Courts
Brunswick Judicial Circuit

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

GEORGIA DEPARTMENT OF
HUMAN RESOURCES, EX RE.
DANIEL CASSEL,

Plaintiff,

vs. CIVIL ACTION NO. 91--2151

ALAN DAVID TUCKER,

Defendant.

ORDER

Defendant has requested reconsideration of this Court's Order of January 15, 1992, which granted Plaintiff's motion to require him to submit to an HLA blood test, on the ground that his argument that the statute under which said motion was made is unconstitutional.

To challenge the constitutionality of a statute, a party must allege that he has harmed by its provisions. In this case, Defendant asserts that his rights

have been violated because O.C.G.A. Section 19-7-45 arguably makes blood tests mandatory, upon the request of any party, in cases filed by the Georgia Department of Human Resources, while it allows the Court to exercise discretion in granting or denying such requests tests in cases filed by private parties. However, the constitutional issue raised by Defendant need not be reached, because the Court would have granted the request for a blood test even if the Department had not been the petitioner.

Defendant has provided an affidavit from his physician, alleging that it is medically impossible for him to be the father of Daniel Cassell. The Court has been unable to find any precedent for the notion that a party can block discovery of relevant evidence by presenting expert testimony that would, if left uncontradicted, entitle that party to judgment as

a matter of law. Since the proffered expert testimony involves a questions of medical fact, and medicine i s not an exact science, Plaintiff must be permitted to proceed with discovery related to that fact.

For the foregoing reasons, Defendant's motion for reconsideration of this Court's Order of Janaury 15, 1992 is **DENIED.**

SO ORDERED, this 7 day of February, 1992.

s/s A. Blenn Taylor, Jr.
A. BLENN TAYLOR, JR.
JUDGE, SUPERIOR COURTS
BRUNSWICK JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

GEORGIA DEPARTMENT OF HUMAN RESOURCES, EX.REL. DANIEL CASSELL,	&	CIVIL ACTION NO. 91-02151
Plaintiff,	&	
vs.	&	
ALAN DAVID TUCKER,	&	
Defendant.	&	

CERTIFICATE OF IMMEDIATE REVIEW

Defendant in the above proceeding has requested a Certificate of Immediate Review under the provisions of O.C.G.A. Section 5-6-34(b) of this Court's Order dated January 15, 1992 granting Plaintiff's Motion for a mandatory blood test under the provisions of O.C.G.A. Section 19-7-45. Defendant has challenged and opposed the Motion and challenged the constitutionality of the process by submitting competent medical evidence that it is medically impossible for him to be the father of the child,

and that the provisions of O.C.G.A. Section 19-7-45 deny him due process under the law by virtue of removing the Court's discretion to refuse to order a blood test. This Court feels that its Order of January 15, 1992 is of such importance to the case that immediate review should be had.

ACCORDINGLY, the undersigned hereby certifies within ten (10) days of the date of the entry of the Order that its Order as aforesaid is of such importance that an immediate review should be had by the Supreme Court or the Court of Appeals.

SO ORDERED this 22 day of January, 1992.

s/s A. Blenn Taylor, Jr.
A. BLENN TAYLOR, JR., JUDGE
Superior Court of Glynn County
Georgia

Case No. S9210536

SUPREME COURT OF GEORGIA

ATLANTA FEB 19, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ALAN D. TUCKER v. GEORGIA DEPARTMENT OF HUMAN RESOURCES, ex rel.

From the SUPERIOR COURT of GLYNN County.

Upon consideration of this Application for Interlocutory Appeal, it is ordered that it is hereby denied.

Clarke, C.J., Weltner, P.J., Bell, Hunt and Fletcher, JJ., concur. Benham, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

s/s Lynn M. Stinchcomb, Deputy Clerk

Portion of Trial Transcript, Page 5 Line 9-15.

Also, one final ground, and that is, looking at the array of the jury assembled, it appears that there is a disproportionate number of female potential jurors on the list, far in excess of the statutory or the historical percentage in Glynn County, and, as such, we would challenge the array upon the statistical makeup of the jury.

Portion of Trial Transcript, Page 11 Lines 10-25.

MR. PALMATARY: With regard to the challenge to the array, Your Honor, according to the jury list, the computer printout which has the date of March 8th, 1993, of the initial list of 125 typed names, only 43 percent are male, 57 percent are female, and checking Friday with the clerk's office, of those who have been excused, there were like nine additional men who were excused. That

leaves, apparently, this morning, of the original 125, only 36 percent of potential male jurors. As such, we would contend that on the statistical population of Glynn County, that we do not have a proper array to hear this case.

THE COURT: I'll hear any evidence you wish to offer to support your motion.

MR. PALMATARY: Your Honor, I would submit the clerk's list, the original court records, the clerk's list

Portion of Trial Transcript, Page 12 Lines 1-16.

that they keep. The court record would show that, and I would assume that the clerk has a copy of it here showing who was on the list and who has been excused.

THE COURT: Yes, and that will be part of the record. I'll hear any evidence you wish to offer.

MR. PALMATARY: Your Honor, what I would offer is that there were excused

from the list of jurors number four, nine, 15, 18, 23, 29, 33, 41, 44, 45, 48, 49, 54, 58, 61, 63, 64, 69, 73, 80, 88, 98, 93, 97, 100, 116, 119.

THE COURT: Whatever the record reflects will be controlling in the case. It's filed in the record. Once again, I'll hear any evidence you wish to offer at this time.

MR. PALMATARY: Nothing else.

THE COURT: All right, your motion to challenge the array is denied.

Portion of Trial Transcript, Page 39 Lines 2-15.

MR. PALMATARY: Your Honor, one additional, for the record. With regard to my prior motion of the array of jury and the number of men and the number of females, we'd like to object that the plaintiff in this case has systematically and arbitrarily used her peremptory strikes to strike almost all males from

the array, leaving the jury constituted with a substantial majority of females versus males. I believe it's eight females and four males on the jury panel selected. As such, we would again renew our objection to the array and the panel we had to choose from.

THE COURT: Ms. Skelton, any response?

MS. SKELTON: No, Your Honor.

THE COURT: All right, it's noted.

IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

GEORGIA DEPARTMENT OF
HUMAN RESOURCES, EX REL.
DANIEL CASSEL,

Plaintiff,

vs. CIVIL ACTION NO.91-02151

ALAN DAVID TUCKER,

Defendant.

JUDGMENT ON JURY VERDICT

This action having come before the Court for trial by jury, and the jury having rendered its verdict, it is hereby

ADJUDGED AND DECREED that the Defendant, Alan D. Tucker, is the father of Daniel Cassel, a minor child.

Defendant shall pay child support in the amount of $345.00 per month, with the first such payment due on May 1, 1993, and subsequent payments due on the first day of each month. Said support payments shall continue until the child reaches the age of eighteen, marries, dies, or

becomes fully self-supporting. The payments shall be made to the Child Support Receiver of Glynn County, and Defendant shall be responsible for the statutory fee for such payments.

Defendant shall provide medical insurance coverage for the minor child, during the period he is obligated to pay child support for said child. Defendant shall be responsible for one-half of all necessary medical expenses incurred on behalf of the child which are not covered by insurance. In the event the mother of the minor child has access to health insurance coverage for the child through her employment or otherwise, and she and Defendant agree that such coverage is better that what Defendant has obtained, the parties by mutual consent can agree to make such coverage available for the child by having Defendant reimburse the mother for her out of pocket cost of

securing such coverage.

Plaintiff is awarded the sum of $2042.00 as attorneys fees, and $1428.00 as expenses, and court costs are assessed against Defendant. Defendant shall pay the aforesaid sum of $3470.00 to Plaintiff by making five payments of $600.00 each on the first day of each month commencing with June 1993, and a final payment of $470.00 on the first day of November, 1993. Said payments shall be made to the Department of Human Resources, Child Support Enforcement, P.O. Box 1624, Brunswick, Georgia 31521-1624.

Plaintiff has requested repayment of public assistance paid for the benefit of the minor child. No request for such repayment was made in opening or closing argument by Plaintiff. The form on which the jury entered its verdict, which did not provide for recovery of public

assistance, was inspected by counsel and no objection was made to said form. Under these circumstances, Plaintiff is not entitled to judgment against Defendant in the amount of public assistance paid on behalf of the minor child.

This 27 day of April, 1993.

s/s A. Blenn Taylor, Jr.
A. BLENN TAYLOR, JR.
JUDGE, SUPERIOR COURTS
BRUNSWICK JUDICIAL CIRCUIT

Case No. S93D1315

SUPREME COURT OF GEORGIA

ATLANTA JUN 04, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ALAN D. TUCKER V. GEORGIA DEPARTMENT OF HUMAN RESOURCES, EX. REL. DANIEL CASSELL

From the SUPERIOR COURT of Glynn County.

Upon consideration of this Application for Discretionary Appeal, it is ordered that it is hereby dismissed.

All the Justices concur, except Clarke, C.J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

s/s Lynn M. Stinchcomb, Deputy Clerk

Court of Appeals

of the State of Georgia

ATLANTA, JUNE 17, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

APPLICATION NO. A93D0200

ALAN D. TUCKER v. GEORGIA DEPARTMENT OF HUMAN RESOURCES, EX REL. DANIEL CASSELL

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby DENIED.

93024

9102151

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/s Victoria McLaughlin, Clerk.

Court of Appeals

of the State of Georgia

ATLANTA, JULY 02, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A93D0200

ALAN D. TUCKER v. GEORGIA DEPARTMENT OF RESOURCES, EX REL. DANIEL CASSELL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

93-024
91-2151

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/s Victoria McLaughlin, Clerk.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: OCTOBER 05, 1993

G. Carroll Palmatary
HUTTO, PALMATARY & MAGDA, P.A.
P. O. Box 1475
Brunswick GA 31521

Case No. S93C1608

ALAN D. TUCKER V. GEORGIA DEPARTMENT OF HUMAN RESOURCES ET AL.

COURT OF APPEALS CASE NO. A93D0200

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

s/s Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 28, 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S93C1608

ALAN D. TUCKER V. GEORGIA DEPARTMENT OF HUMAN RESOURCES ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

s/s Sherie M. Welch, Clerk

S93C1608

SUPREME COURT OF GEORGIA

Atlanta DEC 3, 1993

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ALAN D. TUCKER v. GEORGIA DEPARTMENT OF HUMAN RESOURCES et al.

It is ordered that the Second Motion for Reconsideration, in this case, received on November 12, 1993, is hereby allowed filed.

It is further ordered that upon consideration of such motion, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerks Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/s Lynn M. Stinchcomb
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 11 1994
OFFICE OF THE CLERK

No. 93-1397

In The

Supreme Court of the United States

October Term, 1993

ALAN D. TUCKER,

Petitioner,

vs.

GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF OF RESPONDENT GEORGIA DEPARTMENT OF HUMAN RESOURCES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney General of Georgia

WILLIAM C. JOY
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QUESTIONS PRESENTED

1. Whether Petitioner waived his *Batson v. Kentucky* challenge to the peremptory jury strikes utilized by the Respondent by failing to raise his objection until after the remainder of the venire had been discharged and a jury impanelled?

2. Whether Petitioner established a *prima facie* case of purposeful discrimination concerning the use of peremptory jury strikes by the Respondent so as to require Respondent to explain those strikes under the shifting burden test of *Batson v. Kentucky*?

3. Whether O.C.G.A. § 19-7-45 which requires blood-testing upon request of any party to a paternity action initiated by the Respondent is consistent with the Due Process and Equal Protection Clauses of the United States Constitution, especially in light of the federal mandate for such legislation, *see* 42 U.S.C. § 666(a)(5)(B)?

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STATEMENT OF THE CASE

In order to receive federal financial participation for its public welfare program of Aid to Families with Dependent Children (AFDC), the Georgia Department of Human Resources (hereafter "Respondent") must maintain a child support enforcement program in accordance with Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* 42 U.S.C. § 602(a)(27). Respondent is the public administrative agency in the State of Georgia charged with implementing Title IV-D. The agency undertakes to provide child support enforcement services either upon the request of a person not receiving AFDC, or automatically whenever a custodial parent is an AFDC recipient.

On November 28, 1990, Ms. Sonja Cassell applied for AFDC benefits on behalf of her son, Daniel B. Cassell. (A38). Upon application for these benefits, Ms. Cassell was required to supply the name of the putative father of her son and she indicated that Alan D. Tucker (hereafter "Petitioner") was the father of the child. (A39). After investigating the circumstances of this claim, Respondent commenced a civil action against Petitioner in the Superior Court of Glynn County seeking to determine his paternity of Daniel B. Cassell, to establish a child support obligation, and to recover amounts of federal and state funds expended in support of the child.

During the course of the paternity proceedings, Respondent sought a blood test to discover scientifically the likelihood that Petitioner was the father of Daniel B. Cassell. (Petition, p. A6). The trial court granted this request over Petitioner's objections that he had received a vasectomy and could not be the father of the child, and

rejected Petitioner's contention that Georgia's blood testing statute, O.C.G.A. § 19-7-45, violated due process and equal protection principles. (Petition, pp. A6, A10).

With respect to Petitioner's claim that a vasectomy occurred, testimony at trial revealed that the doctor allegedly performing the procedure was unable to locate the medical file documenting the procedure. The doctor also admitted to being a personal friend of the Petitioner, and to having been himself accused of fathering a child out of wedlock. (A43). As for the scientific evidence, based upon six DNA probes performed on the blood samples of Petitioner, Sonja Cassell, and Daniel Cassell, a medical expert at trial determined that Petitioner was 206,624 times more likely to be the father of Daniel Cassell than a randomly selected North American caucasian male, or a probability of paternity in excess of 99.99 percent. (A40-41).

After considering all the evidence at trial, the jury determined unanimously that Petitioner was the father of Daniel Cassell. (A47). Based on this determination, the jury awarded child support payments to Sonja Cassell. (A47). Due to the fact that Respondent failed to request AFDC reimbursement in the charge to the jury, the trial court ruled that Respondent could not recover its welfare expenditures. (Petition, pp. A22-23). The trial court entered its judgment based upon the jury's verdict. (Petition, p. A20). Petitioner's subsequent appellate challenges to this judgment in the Court of Appeals of Georgia and the Supreme Court of Georgia were denied. (Petition, pp. A25-29). This Petition followed.

SUMMARY OF THE ARGUMENT

Petitioner seeks a writ of certiorari from this Court on two grounds. He first contends that the Respondent exercised its peremptory challenges at the trial of this action in a discriminatory manner so as to exclude males from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). He next contends that a statute of the State of Georgia which provides for blood testing in paternity actions is unconstitutional. He argues that because courts have discretion to order blood tests in cases brought by private parties, but no discretion to order testing in cases initiated by Respondent, that he is deprived of due process and equal protection of the laws. Both contentions lack merit.

The Petitioner waived any defect in the composition of the jury by failing to object to the Respondent's use of its peremptory challenges until after the venire was discharged by the trial court. Under decisions of the Georgia appellate courts, and a majority of federal circuit courts, an objection is timely only if made prior to the dismissal of the venire so that the trial court will have an opportunity to correct any alleged error in the composition of the jury by substituting another jury member if necessary. By waiting until all possible alternate jurors were dismissed, and the selected jury discharged, to make his challenge, Petitioner failed to timely preserve his objection.

Even assuming *arguendo* that Petitioner has not waived his *Batson* challenge, he failed to raise an inference of purposeful discrimination sufficient to require the

Respondent to explain the use of its peremptory challenges. Petitioner used all six of his challenges to strike female jurors from the panel. Respondent used its challenges to strike five males and one female from the panel. The resulting jury was composed of four males, eight females, and one male alternate juror. The percentage of males in the venire compared to the number who were chosen to serve on the jury is virtually identical. Moreover, the trial transcript reflects gender neutral reasons for striking three of the five males who were excluded from the jury. Taking into account all the relevant circumstances, Petitioner failed to establish a *prima facie* case of purposeful discrimination and therefore consistent with *Batson* the burden did not shift to Respondent to explain its use of peremptory challenges.

Neither has Petitioner demonstrated any reason why the Georgia blood testing statute should be struck down as unconstitutional. The Georgia legislation was adopted in response to a Congressional directive that all states enact mandatory blood testing in their federally funded child support enforcement programs. Georgia complied with this directive. The challenged statute does not impact any fundamental right of Petitioner, nor does it affect a suspect class. Accordingly, the statute must be upheld if rationally related to any legitimate state purpose. Making blood testing available in cases where public resources are involved assures that scientifically reliable evidence of paternity is obtained at an early stage of the proceedings thereby conserving litigation resources.

With respect to Petitioner's due process challenge, blood testing is not so significant an invasion of the body

to implicate substantive due process as this Court has held. Procedural due process was afforded to Petitioner since the order for blood testing was entered only after notice and a hearing. As to equal protection, the challenged statute operates uniformly upon all parties to the paternity action, leaving the only valid equal protection comparison between actions initiated by Respondent and those initiated by a private party. Unlike actions brought by private parties which may arise from spurious or groundless allegations, actions initiated by the Respondent are undertaken only after careful investigation and to further the public interest in legitimacy and support of children. Distinguishing actions brought by private plaintiffs and actions brought by Respondent on the foregoing grounds is eminently rational.

REASONS FOR DENYING THE PETITION

I. The Appellate Courts Of Georgia Properly Declined To Overturn The Superior Court's Finding That Respondent's Exercise Of Peremptory Challenges Was Consistent With *Batson v. Kentucky*.

A. Petitioner Waived His Challenge To The Peremptory Strikes Utilized By Respondent Where He Failed To Raise His Objection Before The Jury Was Impanelled And The Remainder Of The Venire Discharged.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court first recognized the fundamental principle that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the exclusion of persons from jury service based solely upon their race. Although *Batson* initially encompassed only criminal

trials and actions by a prosecutor, the Court has since expanded the equal protection guaranties to jury strikes by criminal defendants, *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33, (1992), and jury strikes in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Very recently, the Court extended those protections to peremptory jury strikes targeting one gender. *J.E.B. v. Alabama*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, Case No. 92-1239, April 19, 1994. Despite the broadening reach of *Batson* in modern jurisprudence, one unyielding prerequisite to its application remains: a timely objection by the person seeking its benefit. *Batson*, 476 U.S. at 99.

Largely, this Court has left to state and federal trial courts the task of determining whether a *Batson* challenge has been timely presented. *Batson*, 476 U.S. at 99. Although the federal circuit courts of appeal have not spoken with a uniform voice in deciding the time a *Batson* challenge must be asserted, a clear majority of those courts require a *Batson* objection to be made at the close of *voir dire* or before the venire is released.[1] The Supreme

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[1] The Third, Fifth, and Eighth Circuits have held that a *Batson* challenge must be raised either at the conclusion of *voir dire* or before the venire is dismissed and trial commences, Government of the Virgin Islands v. Forte, 806 F.2d 73, 75-76 (3rd Cir. 1986); United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994); whereas the Ninth Circuit has permitted a challenge to be raised even after the jury is sworn, United States v. Thompson, 827 F.2d 1254, 1257 (9th Cir. 1987). The Eleventh Circuit has not made a definitive statement about when a *Batson* challenge is untimely, although it did permit one such challenge after a venire was dismissed due to the absence of counsel immediately

Court of Georgia requires that a *Batson* challenge be raised before the jurors who are selected to serve in a criminal case are sworn. *Georgia v. Sparks*, 257 Ga. 97, 355 S.E.2d 658 (1987). *Accord, Greene v. Georgia*, 260 Ga. 472, 396 S.E.2d 901 (1990). The purpose in requiring the challenge to be made at this time is to afford the trial court "an opportunity to determine whether there has been a violation of the defendant's constitutional rights under *Batson* and, if so, to remedy that violation and proceed to the trial of the case." *Sparks*, 257 Ga. at 98, 355 S.E.2d at 659. This Court has described that requirement as "a sensible rule". *Ford v. Georgia*, 498 U.S. 411, 422 (1991).

A somewhat different situation is presented in a civil case however. Unlike in a criminal case where two oaths are required, *see* O.C.G.A. §§ 15-12-132, 15-12-139, civil cases in Georgia require only one oath prior to *voir dire*. *Strozier v. Clark*, 206 Ga. App. 85, 424 S.E.2d 368 (1992). As a result, there can be no procedural requirement that a *Batson* challenge be made prior to the jurors being sworn since the jury has not been selected at the time the oath is administered. (A10). Nevertheless, the purpose of a timely objection remains the same, to allow the trial court a meaningful opportunity to correct any alleged defect. *Strozier*, 206 Ga. App. at 86, 424 S.E.2d at 370.[2] The

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following jury selection, United States v. Rodriguez, 917 F.2d 1286, 1288 n.4 (11th Cir. 1990), but see United States v. Chandler, 996 F.2d 1073, 1102 (11th Cir. 1993) (supporting the majority view).

[2] In *Strozier*, the court of appeals concluded that the *Batson* objection was timely where presented "subsequent to selection and prior to the commencement of the trial." *Id.* However, the court in that case was not presented with the situation here

Georgia Court of Appeals provided civil litigants with concrete guidelines in *Calhoun v. Purvis*, 206 Ga. App. 565, 425 S.E.2d 901 (1992) (*en banc*). The court concluded that the *Batson* challenge must be raised "no later than would preserve the opportunity to correct any violation without resetting the trial." *Calhoun*, 206 Ga. App. at 568, 425 S.E.2d at 904. In *Calhoun*, the motion should have been raised before the jury selected and the jurors not selected were released.[3]

Petitioner made two challenges to the jury selection process in this case. He first challenged the array from which the jury panel was drawn arguing that males had been disproportionately excluded. (A9). This challenge was raised before *voir dire* of the jury panel began. (A9). Petitioner offered only the jury list from the court clerk's office in support of his claim, and the trial court denied the challenge. (A9-10).[4]

Thereafter, the jury panel was sworn by the clerk and *voir dire* was permitted. (A10). At the conclusion of the *voir dire*, three jurors were excused for cause and both Petitioner and Respondent exercised their peremptory strikes to select a jury. (A12-13; 32). After all strikes had

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where the remaining venire members were excused by the trial court and thus unable to participate in any corrective action which might have been deemed appropriate.

[3] Although the challenge in *Calhoun* was untimely under the guidelines announced in that appeal, the court applied its reasoning prospectively and remanded the case for a hearing on the *Batson* issue.

[4] Petitioner did not pursue his challenge to the array in subsequent proceedings, or before this Court, and therefore this claim of error must be deemed abandoned.

been made, the trial court excused those jurors who had not been selected and impanelled the jury. (A33-34). The jurors who were released were told that they did not have any further jury service obligation for that trial week. (A10; 34). After preliminary instructions, the selected jurors were also excused and told to report a day later for the trial. (A34-35).

After all jurors had been released, Petitioner's counsel made a motion for confidentiality in light of the nature of the proceedings. (A35). After that motion was denied, Petitioner's counsel raised for the first time an objection to the peremptory strikes that had been exercised by Respondent's counsel. (A36). This objection was made after the remainder of the venire was released, a jury impanelled, and the selected jurors excused. (A34-36). Consequently, Petitioner's challenge was untimely under *Calhoun v. Purvis*, 206 Ga. App. 565, 425 S.E.2d 901 (1992) (*en banc*).

To promote judicial economy, Georgia trial courts must be permitted to limit *Batson* challenges to a time when there remains a realistic opportunity to correct any error which may be urged upon the court. Once the remainder of the venire was released in this case, it became impossible to address Petitioner's challenge without recalling those jurors not selected or assembling a new panel to alter the composition of the jury seated to serve. Creating such needless delay is the precise reason why a party is required to raise a *Batson* challenge prior to the release of the jury panel. Petitioner waived his

challenge here and therefore the writ of certiorari should be denied.[5]

B. Petitioner Failed To Establish A *Prima Facie* Case Of Discrimination Sufficient To Trigger A *Batson* Hearing Where The Gender Composition Of The Panel And The Gender Composition On The Selected Jury Was Virtually Identical.

Applying this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), to the present facts, it becomes apparent that Petitioner failed to establish that the Respondent's exercise of its peremptory challenges constituted a *prima facie* case of discrimination sufficient to warrant shifting the burden to Respondent to explain those strikes. This is not a case such as *J.E.B. v. Alabama*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, Case No. 92-1239, April 19, 1994, where a public agency attempted to uphold its use of discriminatory strikes by arguing that gender was not a protected class under the Fourteenth Amendment. Rather, Respondent utilized its peremptory challenges in a non-discriminatory manner as evidenced by the composition of the jury selected in this case.

Court records indicate that the jury panel in this case was composed of 30 members. (A33). Of this number, 12 prospective jurors were male, and 18 prospective jurors were female. (A12-13; 32-33; 49-50). During general *voir*

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[5] Neither is this an appropriate case for this Court to excuse Petitioner's procedural default under the "plain error" doctrine. *See* Clark v. Newport News Shipbuilding and Dry Dock, 937 F.2d 934, 938-940 (4th Cir. 1991).

dire of the jury by the court, two male jurors indicated that they could not guarantee their impartiality due to prior knowledge of the case. (A11-13). Although the parties raised no challenge to these individuals, the court excused them for cause. (A12-13). A female juror was also excused for cause at the request of the Petitioner. (A32). After jurors struck for cause were removed from the venire, the gender composition of the remaining jurors was 10 males and 17 females. Males comprised 37 percent of the venire from which jurors were to be selected.

Upon the conclusion of *voir dire*, the parties exercised their peremptory challenges upon the remaining 27 potential jurors. Petitioner struck six female jurors from the panel. (A33; 51).[6] Respondent struck five male jurors and one female juror from the panel. (A33; 51).[7] Accordingly, the selected jury consisted of 4 male jurors, 8 female jurors, and 1 male alternate juror. Thus, the selected jury was composed of 33 percent males, or 38 percent males if the alternate juror is included in the calculation. Comparing the composition of the potential panel, 37 percent male, with the composition of the actual panel, 33 percent male, yields a difference of 4 percent, hardly a resounding condemnation of Respondent's peremptory challenges. In keeping with this Court's admonition that determining the existence of a *prima facie*

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[6] Apparently, Petitioner saw no conflict with *Batson* in using all six of his peremptory challenges against persons of the same gender.

[7] The ordering of the strikes by Respondent was four males, then one female, and finally one male. (A33; 51). Of the first four males struck, the record reflects gender neutral reasons for strikes used against three of them, as discussed infra.

case under *Batson* involves a review of the relevant circumstances, not just the strikes themselves, the trial court could easily have concluded that Petitioner had failed to establish a *prima facie* case of purposeful discrimination against males in using peremptory challenges. *See Batson*, 476 U.S. at 96-97; *United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990). The trial court's determination is entitled to great deference. *Lingo v. Georgia*, 263 Ga. 663, 437 S.E.2d 463 (1993).

The transcript of the *voir dire* discloses gender neutral reasons for the exercise of a peremptory challenge against three of the five males struck from this jury. Juror Readdick was a former patient of the physician who allegedly performed the vasectomy upon Petitioner. (A15-16; 41). A prior relationship with a crucial witness to the defense was certainly a valid basis to exercise a strike. Juror Sowerby was an attorney in the community and admitted hearing pre-trial information concerning the case. (A21-22). Given that Petitioner is also an attorney in the same small community, and that pre-trial knowledge of the case was professed, striking Juror Sowerby was a reasoned choice. Finally, Juror Patel admitted knowing the Petitioner and having heard of the case through the media. (A12; 26). Since Juror Patel knew Petitioner, and knew about the case, Respondent had a reasonable basis for striking Juror Patel from the panel. The transcript is silent as to any *voir dire* answers by Jurors Pugh and Holmes.

Taking into account the marginal difference between the gender composition of the jury panel and the jury ultimately selected, it is certainly reasonable to conclude that the Petitioner failed to establish a *prima facie* case of

discriminatory use of peremptory challenges by the Respondent. Respondent did not use all of its strikes against persons of the same gender, as the Petitioner did, and the transcript supplies neutral reasons for the striking of three of the five males excluded from the jury. Using the "relevant circumstances" analysis approved in *Batson*, there was no *prima facie* case established by Petitioner and it was not incumbent upon the trial court to require Respondent to explain the basis for its strikes. Petitioner did not "raise the inference" that purposeful discrimination had occurred. Consequently, the writ of certiorari should be denied by this Court.

II. The Georgia Superior Court Properly Held That Compelling Blood Tests In Cases Where Respondent Is Involved Satisfied Due Process and Equal Protection Guaranties And The Georgia Appellate Courts Acted Appropriately By Not Disturbing That Decision.

As an alternative ground for seeking the writ of certiorari from this Court, Petitioner argues that O.C.G.A. § 19-7-45, a statute dealing with blood testing in paternity actions, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The transgression asserted by Petitioner is that trial courts lack discretion to order blood tests in cases where Respondent is the plaintiff, whereas a trial court may elect not to order blood testing when a private party brings the action. Significantly, the statute attacked by Petitioner was adopted by the Georgia legislature in response to a Congressional mandate that such tests be available to any party who requests genetic tests

in actions initiated under Title IV-D of the Social Security Act, 42 U.S.C. § 666(a)(5)(B). Notwithstanding the Congressional mandate, the statute is not unconstitutional for the grounds alleged.

Since Petitioner fails to cite a single case supporting his position, Respondent will set forth the relevant standards for evaluating his constitutional challenge. This Court has institutionalized the method by which legislation is to be reviewed upon a constitutional challenge being made and has adopted varying degrees of scrutiny depending upon the circumstances presented by each case. Because Petitioner complains about a court procedure, he has articulated no violation of any fundamental right secured to him by the Constitution or laws.[8] Thus, the question presented below was whether procedural due process was afforded.

Neither has Petitioner shown that a suspect class is adversely impacted for purposes of an equal protection challenge.[9] Where no fundamental rights are implicated,

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[8] Although Petitioner's challenge is not altogether clear, the Respondent does not understand him to complain about the fact that blood tests can be ordered by a court, or to present any type of bodily integrity argument implicating substantive due process. In any event, this Court has held that blood testing is not so substantial an invasion of the body to violate substantive due process. Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1956).

[9] At one point, Petitioner suggests that the legislation may adversely impact males. (Petition, p. 18). However, since the legislation is gender neutral and the mother of a child may also be compelled to participate in blood testing over her objection, the legislation operates uniformly against all persons from a

and no suspect class is involved, legislation need only satisfy a rational relationship test; no heightened scrutiny is necessary. *City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989). The relevant test is: does the legislation rationally relate to a legitimate state purpose? *Id.* Applying this test to the legislation at hand leads inescapably to the conclusion that no constitutional violation exists. (Petition, pp. A6-8).

With respect to any claimed violation of procedural due process, the record plainly reflects that the blood test order was entered after a hearing upon a motion which Respondent filed under O.C.G.A. § 19-7-45. (Petition, p. A6). It is beyond question that Petitioner was afforded notice and an opportunity to be heard prior to entry of the order. Though Petitioner may argue that a hearing is a hollow process if the Court lacks discretion to deny the relief, he was nonetheless provided with an ample opportunity to raise any objections to the blood test or to convince the court that the action should not proceed against him based upon some other ground. He even attempted an interlocutory appeal of the lower court's ruling. (Petition, p. A15). Petitioner was provided procedural due process.

Insofar as Petitioner's equal protection claim is concerned, the statute by its terms operates uniformly as to all parties involved in the action. Blood testing will be ordered in cases where Respondent is a party regardless of whether it is requested by the putative father, the

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gender standpoint. The only valid comparison is between the state and private parties as plaintiffs.

custodial parent, or the Respondent. O.C.G.A. § 19-7-45. Accordingly, where paternity blood testing is concerned, the only meaningful comparison is between actions brought by Respondent, and those initiated by private parties. Valid reasons exist for treating actions brought by private individuals differently from those brought by the state.

Whereas private actions may be spurious or groundless, actions commenced by the Respondent are instituted only after careful investigation and upon valid grounds. The resources of the public are not squandered on pursuing petty domestic battles. Moreover, public policy favors the legitimacy of children, *see Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983), and contemplates that children will be supported by their parents, not the taxpayers, *see Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977). The purpose of the Title IV-D program is to recoup the drain of welfare expenditures on the federal and state treasuries, *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), and permitting genetic testing is rationally related to the goal of establishing paternity in a scientific and reliable manner. Allowing genetic testing early in the proceedings provides an accurate yardstick by which to measure whether further public funds should be expended litigating paternity with a particular individual. *See Britten v. Georgia*, 173 Ga. App. 840, 328 S.E.2d 556 (1985).

Finally, in applying the rational relationship test to this legislation, it should not be overlooked that the Court is examining not only the wisdom of an act of the Georgia legislature, but the design of Congress which compelled the states to adopt mandatory blood testing

provisions in connection with their Title IV-D programs. 42 U.S.C. § 666(a)(5)(B). Should the Court find the Georgia statute violative of due process or equal protection principles, its decision may impact not only Georgia's statutory scheme, but every state in the nation which by necessity must have similar legislation. Needless to say, Respondent firmly believes that the challenged legislation passes constitutional muster and that Petitioner's challenge is without merit. Consequently, the Court is urged to deny the writ of certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied, or alternatively the decision of the Supreme Court of Georgia should be summarily affirmed.

Respectfully submitted,

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[p. 2] * * *

CONVENE - 9:01 A.M., MARCH 8, 1993

THE COURT: Cassel versus Tucker.

MS. SKELTON: Ready, Your Honor.

MR. PALMATARY: Your Honor, the defendant at this time moves for a continuance on several grounds. First of all, under Rule 24 of the Uniform Rules, the plaintiff has failed to furnish the defendant with a financial affidavit; has failed to file one with the Court at least 10 days prior to trial. Under the rules, that is a ground for a continuance. We are in effect here being asked to defend a case without having been furnished very crucial information concerning the financial needs of the child if the verdict should be that way. As such, we are being ambushed. We're having to try this case under a surprise. There is no prior way that we could have done this or known about it before 10 days, because there is only a 10-day requirement. As such, on that ground, we would move for a continuance of this case until such time as the plaintiff complies with the statutory rules of procedure of the superior courts.

THE COURT: What is your next ground?

MR. PALMATARY: Your Honor, the next ground is that we object to the amendment of the pretrial order in this case signed by the Court a few days ago wherein the plaintiff asked for two new witnesses. In the plaintiff's [p. 3] motion, she alleged certain reasons that one employee was no longer there. The other witness was known at all times. It's not a new witness. This, again, leads us into a surprise situation. We have not had the

opportunity to depose this witness or conduct any discovery as to what he might say. It only happened a few days ago. I've been tied up in depositions with a case Your Honor has set for this Friday, the Coastal Bank case. I was in federal court last week, and on two or three days' notice, to try to take a deposition and conduct discovery in North Carolina is impossible, so on that ground we would object to the Court's amendment of the pretrial order and ask for a continuance on that ground until we can engage in discovery with regard to these two new witnesses she's listed.

THE COURT: Is that all of your grounds?

MR. PALMATARY: No, sir. The next ground, we claim that the plaintiff in this case has misled this Court with regard to the two witnesses. We were belatedly furnished some type of a synopsis of some kind of a test this new witness has done very recently. The new witness, Mr. Bever, the plaintiff asked the Court to amend the pretrial court order on for the reason that the other witness was no longer employed there. However, what it turns out is, this new witness, this new expert witness, has apparently [p. 4] conducted some new tests. These new tests have not been authorized by this Court. There is no court order authorizing any additional tests. These new tests are different from the prior tests. We have not had an opportunity to conduct discovery on this or to consult with our expert as to what these new test results may be. For the record, the tests were apparently done, were conducted apparently, February 27th, which the Court will note was only like nine or 10 days ago. We did not get it for several days after that. As such, we claim surprise. No amount of diligence can prepare for a brand-

new expert witness who has conducted brand-new tests within 10 days prior to the trial date. As such, we claim that we are entitled to a continuance on that ground.

Also, there is one additional ground. The plaintiff has yet a motion pending for yet another new witness. This is not a newly-discovered witness. It's one she's known all along. We have relied upon the pretrial order that's been signed in this case, our tactics and our trial procedures on how to conduct this case, and at the last minute all of the new witnesses come in, so we contend that it is impossible to conduct the defense of this case with all of the brand-new witnesses called in at the very last minute with new evidence, and leaving us without an opportunity to conduct discovery to see what they have to [p. 5] say, or to let our expert see what these new experts have to allow. As such, we contend, under the statute, that we have ample grounds for a continuance of this case. I will state in my place that I don't know what I could have done. I mean it came as a surprise to me. All these new witnesses, new tests, we were not aware of it. It's going to be impossible to defend this case without ample opportunity to see what these new experts have.

Also, one final ground, and that is, looking at the array of the jury assembled, it appears that there is a disproportionate number of female potential jurors on the list, far in excess of the statutory or the historical percentage in Glynn County, and, as such, we would challenge the array upon the statistical makeup of the jury.

THE COURT: Response?

MS. SKELTON: Your Honor, as to the financial affidavit, the State of Georgia is the plaintiff in this case.

The State has never been required to file a financial affidavit. However, if the Court would like for me to get the financial affidavit of the mother of the child, Sonja Cassel, I can do that this morning. She doesn't have any significant assets, there would be nothing significant on there at all, but I can have that done within an hour.

[p. 6] As to the amendment of the pretrial order to add Dr. Kushner and Dr. Bever, Dr. Bever is a director of the laboratory, Genetic Design, where the court-ordered blood tests were performed. The PhD who originally signed the report, Dr. McNight, is unavailable. She no longer works there. I don't have any way to subpoena her. Dr. Bever is here because of a contract he has with the State. He lives in North Carolina, and he works there, and that's how I know that I can get him here. As to Dr. Kushner, he will mainly be used as a rebuttal witness.

I didn't know what kind of tests the defendant's expert would conduct when the pretrial order was signed. I found out after it was signed that in fact she had conducted some tests that have apparently excluded Mr. Tucker as the father of this child. Based upon that, I thought it necessary to have an outside or an independent expert before the Court to compare the types of tests that were done by the court-ordered blood tests at Genetic Design and by the defendant's expert.

Furthermore, as to Dr. Bever, the defendant never attempted to take the deposition of Dr. McNight, who was originally on the pretrial order. She has been on there as long as anyone, and I've received no notice of any attempt to even interview her. As to the, quote, new tests, I believe Mr. Palmatary is speaking of two more DNA

[p. 7] probes in the same blood samples that were originally drawn that were done by Dr. Bever after he met with the expert witness for the defendant, basically to make sure that his test was right. She had an exclusion in there, and he wanted to keep testing to make sure he would be testifying, you know, that Mr. Tucker is most likely the father of this child. He did two more probes to make sure, and that's what he found, and that's what is on his report.

As to Ronald Stack, who I'm asking the Court to allow me to call as a witness, he was not on the pretrial order because I forgot him. He drew the blood at the Doctor's Laboratory here in Brunswick, packaged it and shipped it to North Carolina to Genetic Design. I apologize profusely to the Court. There is no excuse. I just forgot it. He is available here. I told Mr. Palmatary in my motion what his address is, he works not two miles from here, and there won't be any surprise testimony from him. It's a simple matter of chain of custody of some blood samples. I respectfully ask that he be added or that I be allowed to call him. Thank you.

MR. PALMATARY: Your Honor, may I reply?

THE COURT: Yes, sir.

MR. PALMATARY: Ms. Skelton says that Dr. McNight did the tests, but the fact that the person conducting the [p. 8] tests no longer works at the place doesn't change the fact that is the witness who has the knowledge. If Dr. Bever, who apparently did not conduct the initial tests – That's the reason he was not on there. So this is a new witness who has done a new test, and I think we're entitled to see what he's got to say, to look at his

credentials. I know what Ms. McNight's credentials are. We know what she was going to say, but now we've got a brand-new guy. We don't know anything about him, we haven't had the opportunity to look into his background, we don't know what he's going to say. Again, we're totally surprised. At the last minute we've got a whole brand-new ball game here. We've got brand-new tests, apparently. She said original blood samples. Our evidence is that the original blood samples had deteriorated so much that they are not usable. It's possible that any new tests he did are void. We don't know. We think that justice dictates that we be given a fair and reasonable opportunity to know what kind of evidence is going to be coming, what's coming in this case, and we have not had a chance to do that. So, again, we respectfully move for a continuance to enable us to conduct discovery, to look in, to see what this new expert has done; what are these new tests or probes that he did, and find this out. It's very crucial to this case.

THE COURT: The expert you're talking about, that's [p. 9] for rebuttal only? Is that what you're saying, Ms. Skelton?

MR. PALMATARY: No.

MS. SKELTON: No, Your Honor. Kushner and Bever are both experts. Bever is not for rebuttal only. Bever is to testify to the blood tests that were conducted at Genetic Design. Kushner is to compare the two types of testing done by Genetic Design and done by the defendant.

THE COURT: What about Bever? Is he going to testify that he did the tests himself?

MS. SKELTON: Yes, sir, he is going to testify –

THE COURT: Did he do them first?

MS. SKELTON: No, sir.

THE COURT: Second?

MS. SKELTON: He did them second.

THE COURT: Who did them first?

MS. SKELTON: Bette McNight.

THE COURT: Was she deposed by the defendant?

MS. SKELTON: No, Your Honor.

THE COURT: Was any effort made to depose her?

MS. SKELTON: None that I know of.

THE COURT: All right.

MR. PALMATARY: Your Honor, on Bette McNight, we have her test results, we have her resume, we conducted some investigation with her, we know what we've got with her.

[p. 10] Dr. Bever is an entirely different matter. His test results are entirely different than hers.

THE COURT: All right, he'll be made available two hours before his testimony for the defense attorney to interview him prior to trial.

MR. PALMATARY: Your Honor, what if additional discovery or consultation with other experts is

desired? We're not talking about something very simple here. We're talking about very complex –

THE COURT: You'll have a chance to interview him two hours before the trial. You have your expert, you know what he will say then, then you can go over whatever testimony you wish with your expert. The second expert they're using is for rebuttal only, and that's not grounds for a continuance, using a rebuttal witness. There is a recent case just out on that from the Supreme Court.

All right, you'll provide then a financial affidavit before 12 o'clock today, or two hours after jury selection ends.

Your motion for continuances then are denied, with the exception of your challenge to the array. I'll hear that at this time.

MR. PALMATARY: Your Honor, I didn't hear you.

THE COURT: Your motion for continuances then are denied, and I will hear your challenge to the array that [p. 11] you mentioned.

MR. PALMATARY: Your Honor, for the record, we would object to the Court's denial of our motion for a continuance. We say that two hours is insufficient time in which to examine experts, to review financial data, wholly insufficient to prepare for a brand-new defense of this case in two hours' time. It's highly prejudicial and unfair.

THE COURT: All right, they're noted.

MR. PALMATARY: With regard to the challenge to the array, Your Honor, according to the jury list, the computer printout which has the date of March 8th, 1993, of the initial list of 125 typed names, only 43 percent are male, 57 percent are female, and checking Friday with the clerk's office, of those who have been excused, there were like nine additional men who were excused. That leaves, apparently, this morning, of the original 125, only 36 percent of potential male jurors. As such, we would contend that on the statistical population of Glynn County, that we do not have a proper array to hear this case.

THE COURT: I'll hear any evidence you wish to offer to support your motion.

MR. PALMATARY: Your Honor, I would submit the clerk's list, the original court records, the clerk's list [p. 12] that they keep. The court record would show that, and I would assume that the clerk has a copy of it here showing who was on the list and who has been excused.

THE COURT: Yes, and that will be part of the record. I'll hear any evidence you wish to offer.

MR. PALMATARY: Your Honor, what I would offer is that there were excused from the list jurors number four, nine, 15, 18, 23, 29, 33, 41, 44, 45, 48, 49, 54, 58, 61, 63, 64, 69, 73, 80, 88, 98, 93, 97, 100, 116, 119.

THE COURT: Whatever the record reflects will be controlling in the case. It's filed in the record. Once again, I'll hear any evidence you wish to offer at this time.

MR. PALMATARY: Nothing else.

THE COURT: All right, your motion to challenge the array is denied. How long will this case take to try, Cassel versus Tucker?

MS. SKELTON: I think a day, Your Honor.

MR. PALMATARY: A day or a day and a half, Your Honor.

(RECESS – 9:21 A.M. TO 11:20 A.M.)

MR. PALMATARY: Prior to jury selection, if it may please the Court, we would file a motion for confidentiality.

[p. 13] (DOCUMENT GIVEN TO OPPOSING COUNSEL, THE CLERK AND THE COURT)

THE COURT: All right, I'll consider it.

(JURY PRESENT – 11:25 A.M.) (JURORS SWORN BY THE CLERK)

THE COURT: Good morning, members of the jury panel. This case will be tried Wednesday and Thursday of this week for your information. Do you any of you have a personal or a business conflict which you feel is pressing more than the average conflict that you would have by working, by serving on the jury Wednesday and Thursday? If so, would you raise your hand? We'll try to accommodate you. If you are selected to serve on the jury, you will only serve Wednesday and Thursday. If you are not selected to serve on this jury, then you will be excused for the remainder of the week when we complete jury selection in a few minutes.

(NO RESPONSE)

All right, there are none.

GENERAL VOIR DIRE:

THE COURT: Are any of you ladies and gentlemen related by blood or marriage to Daniel Cassel or to Alan D. Tucker? If so, would you please raise your hand?

(NO RESPONSE)

THE COURT: Are any of you employees of the Georgia [p. 14] Department of Human Resources? If so, would you raise your hand?

(NO RESPONSE)

THE COURT: Have any of you in the past been employees of the Georgia Department of Human Resources? If so, would you raise your hand?

JUROR WILLIAMS: I've been an employee of Georgia Natural Resources.

THE COURT: All right. Thank you. Have any of you any prejudice or bias on your mind either for or against any of the parties in the case, The State of Georgia, Department of Human Resources, or Alan D. Tucker? If so, would you raise your hand?

(SHOWING OF HANDS)

THE COURT: Yes, sir, Dr. Tarplee?

JUROR TARPLEE: I know Mr. Tucker personally.

THE COURT: All right. Do you feel that because of your personal knowledge of him you could not be a fair and impartial juror in the case?

JUROR TARPLEE: I might have some difficulty.

THE COURT: All right, sir. Yes, sir?

JUROR DICKSON: I know Mr. Tucker. I've spoken with both of the lawyers. Because of my job, I have written about this case.

THE COURT: Okay, Mr. Dickson. Do you feel like you [p. 15] could not be a fair and impartial juror?

JUROR DICKSON: I have reservations about that, yes, sir.

THE COURT: All right, Mr. Dickson. Mr. Patel?

JUROR PATEL: I know Mr. Tucker. I have a retail drugstore on St. Simons.

THE COURT: Do you feel that you could be a fair and impartial juror?

JUROR PATEL: Yes, sir.

THE COURT: All right, sir. Yes, ma'am?

JUROR WILLIAMS: I know Mr. Tucker, and I've had some friendship, but I can be –

THE COURT: But you feel like you could be fair and impartial in the case, Ms. Williams?

JUROR WILLIAMS: Yes, I could.

THE COURT: Okay. I'll hear any objection as far as Mr. Dickson or Dr. Tarplee, either one. Ms. Skelton?

MS. SKELTON: No, Your Honor. I have talked to Mr. Dickson about this case before I ever knew he was going to be on the jury.

THE COURT: All right. Mr. Palmatary?

MR. PALMATARY: We've got no problem with either one of them, Your Honor.

THE COURT: Do you feel like this would place you in an untenable situation, having to serve on the jury? Look [p. 16] at yourself as if you were on the other side of the case, on the other side of the case from Mr. Tucker. Would you feel comfortable with a juror such as yourself serving on the jury, Dr. Tarplee?

JUROR TARPLEE: I can't answer that, Judge Taylor. I can only say that I know him, I'm somewhat familiar with the issues, I have strong feelings.

THE COURT: All right, sir. Well, I think it probably be best. I'll excuse you, okay, and you won't have to serve on any other jury, and you can go.

Mr. Dickson, I'm going to excuse you also from the panel, and you do not have to come back for any jury service. You can leave.

(JUROR TARPLEE AND JUROR DICKSON WITHDREW FROM THE COURTROOM)

THE COURT: To the remaining members of the panel, are your minds perfectly impartial between the parties in this case, the plaintiff and the defendant? If not, raise your hand.

(NO RESPONSE)

THE COURT: Do any of you have any desire or preference as to which party should prevail – that is, which party should win – either the plaintiff or the defendant? I'll explain to you that this is an action brought by the Department of Human Resources, on behalf of [p. 17]

Daniel Cassel, against Mr. Tucker, to determine paternity; that is, whether or not Mr. Tucker is the father of Daniel Cassel. If the jury should determine yes, then it would also be in a position to have to determine any support payments due. If not, then that would end the deliberation in the case. Now with that in mind, I'll ask you again: Do any of you have any prejudice or bias on your mind, is your mind perfectly impartial between the parties, or do any of you have any desire or preference as to which party should prevail? Having done that, you will answer the question. If so, raise your hand.

(NO RESPONSE)

THE COURT: Thank you. Are any of you now represented by Ms. Mary Skelton, who is seated here at counsel table representing the State? Are any of you represented by her?

(NO RESPONSE)

THE COURT: Are any of you represented at this time by Mr. Carroll Palmatary? Mr. Palmatary represents Mr. Tucker.

(NO RESPONSE)

THE COURT: Are any of you at the present time being represented by Mr. Tucker? If so, would you raise your hand?

(NO RESPONSE)

[p. 18] THE COURT: Ms. Cassel, what is your first name?

MS. SKELTON: Sonja.

THE COURT: Do any of you know Ms. Sonja Cassel, who is seated here with Ms. Skelton? If so, would you raise your hand?

(NO RESPONSE)

THE COURT: Have any of you in the past been represented by Ms. Skelton, Mr. Palmatary or Mr. Tucker as an attorney? If so, would you raise your hand?

(NO RESPONSE)

THE COURT: Ms. Skelton, you may voir dire the jury.

VOIR DIRE BY MS. SKELTON:

MS. SKELTON: Thank you, Your Honor. Good morning. My name is Mary Skelton. I represent the Child Support Recovery Office, which is part of the Georgia Department of Human Resources, in this case. I just have a few questions to ask you. Are any of you personal friends with either Mr. Alan Tucker or Mr. Carroll Palmatary?

(NO RESPONSE)

MS. SKELTON: Thank you. None of you have been represented by either of them. That's right. Okay. Are any of you a patient or a friend of a Dr. Carl Drury, or have you been a patient of Dr. Carl Drury in the past?

(SHOWING OF HANDS)

MS. SKELTON: Yes, sir? What is your name?

[p. 19] JUROR READDICK: Readdick, Ivan Readdick.

MS. SKELTON: And you have been a patient of Dr. Drury?

JUROR READDICK: Yes.

MS. SKELTON: Thank you. Mr. Readdick, if Dr. Drury testifies in this case, do you think that you would be more inclined to believe him than anyone else?

JUROR READDICK: Not necessarily, no.

MS. SKELTON: Thank you. Is there anyone on this panel who – If the Judge instructs you somewhere along in the trial that a child born out of wedlock, not in a marriage, deserves the support and by law should be given the support of both parents, is there anyone here who would believe that the child is not owed a duty of support by a father who was not married to the mother?

(NO RESPONSE)

MS. SKELTON: I know I garbled that up. Did everybody understand me?

(AFFIRMATIVE INDICATION)

MS. SKELTON: Okay, thank you. Do any of you either pay child support or receive child support now?

(SHOWING OF HANDS)

MS. SKELTON: Okay, let's start up here. Ms. Williams?

JUROR WILLIAMS: Yes, my husband pays child support.

[p. 20] MS. SKELTON: Does he pay through the Child Support Recovery Office?

JUROR WILLIAMS: Yes, ma'am.

MS. SKELTON: Anyone else up here? Who raised their hand? Yes, ma'am?

JUROR BAGGS: My children's father pays child support directly.

MS. SKELTON: And what is your name?

JUROR BAGGS: Darlene Baggs.

MS. SKELTON: But he doesn't pay through the child support office?

JUROR BAGGS: No.

MS. SKELTON: Anyone else? Yes, ma'am, what is your name?

JUROR DUNCAN: Sheila Duncan.

MS. SKELTON: Ms. Duncan, do you receive child support?

JUROR DUNCAN: Yes, I do.

MS. SKELTON: Is it through the Child Support Recovery Office?

JUROR DUNCAN: No, it's not.

MS. SKELTON: Thank you. Anyone else?

JUROR LOGUE: I need to ask you a question. I have been represented by Mr. Palmatary before.

MS. SKELTON: You have been represented by Mr. [p. 21] Palmatary. What is your name, ma'am?

JUROR LOGUE: Wynell Logue.

MS. SKELTON: Logue?

JUROR LOGUE: Un-huh.

MS. SKELTON: How long ago was it?

JUROR LOGUE: About eight years ago.

MS. SKELTON: Do you think you would be more inclined to go on his side of this case due to his past representation?

JUROR LOGUE: No, ma'am.

MS. SKELTON: Okay. Thank you.

THE COURT: Yes, ma'am, do you want to say something?

JUROR UTZ: Yes, sir.

MS. SKELTON: I'm sorry.

JUROR UTZ: I didn't realize that Mr. Tucker, when you first introduced him, was a lawyer in this area. My neighbor was represented by him in a very difficult case. I didn't know what he looked like. I don't know whether I could be really impartial.

MS. SKELTON: You're Ms. Utz?

JUROR UTZ: Uh-huh.

MS. SKELTON: Because of what your neighbor told you about her case?

JUROR UTZ: Uh-huh, and the fact that she went to prison would make it real hard for me to be impartial.

[p. 22] MS. SKELTON: Okay. Do you already know which way you would vote in this case, Ms. Utz?

JUROR UTZ: No. I don't know anything about the case.

MS. SKELTON: But once you do, you're still not sure if that would affect your judgment?

JUROR UTZ: She said a lot of things about Mr. Tucker, so it would make it very difficult for me to be impartial.

MS. SKELTON: Okay. Thank you.

I just have one more question for you. In a case like this, involving paternity, obviously intimate questions are going to have to be asked these witnesses, personal, private questions that you and I don't usually talk about in public. Is there anyone here that would feel so uncomfortable about that kind of testimony that they feel now that they couldn't be a proper member of the jury?

(NO RESPONSE)

Thank you. That's all, Your Honor.

THE COURT: All right, Mr. Palmatary –

MS. SKELTON: I'm sorry, Your Honor. I'm sorry? Mr. Sowerby?

JUROR SOWERBY: I have a relative in Glynn County whose last name is Cassel, and I don't know if this [p. 23] plaintiff is related to her or not. Her first name is Marjorie.

MS. CASSEL: (Negative Indication)

MS. SKELTON: No? Okay. Thank you.

THE COURT: Thank you, Mr. Sowerby.

VOIR DIRE BY MR. PALMATARY:

MR. PALMATARY: Good morning, ladies and gentlemen. I'm Carroll Palmatary. I represent Mr. Tucker in this case. As Ms. Skelton indicated to you, this involves some very personal matters, and when I'm asking you these questions I am not trying to pry into anything personal, but these are things we need to know from you folks. Before we get into that, have any of you ever been represented by Grayson Lane, Bob Crowe, or Don Napier, or are you friends with any of those gentlemen?

JUROR STEPHENS: With Bob Crowe.

MR. PALMATARY: And what is your name?

JUROR STEPHENS: Tamara Stephens.

MR. PALMATARY: How well do you know Mr. Crowe?

JUROR STEPHENS: I know him and his wife.

MR. PALMATARY: You're social friends?

JUROR STEPHENS: Yes.

MR. PALMATARY: Have you heard anything about this case? Has he discussed anything about this case?

JUROR STEPHENS: No. I haven't seen him in awhile.

[p. 24] MR. PALMATARY: Pardon?

JUROR STEPHENS: I haven't seen him in awhile.

JUROR PATEL: The Crowes shop at the drugstore.

MR. PALMATARY: Is that your only connection, Mr. Patel; is that they shop at your drugstore?

JUROR PATEL: Yes.

MR. PALMATARY: Mr. Sowerby?

MR. SOWERBY: As an attorney, I know all the attorneys in town. Before I answer I might hear the questions.

MR. PALMATARY: But you know them as attorneys, not as close personal friends or social friends, just the bar association?

MR. SOWERBY: I know Bob Crowe on a personal level. We don't do anything together.

MR. PALMATARY: Mr. Sowerby, have you heard any comments regarding this case?

JUROR SOWERBY: Yes.

MR. PALMATARY: You have?

JUROR SOWERBY: Yes.

MR. PALMATARY: You have prior knowledge of the facts or the allegations in this case?

JUROR SOWERBY: Yes.

MR. PALMATARY: Have you discussed them with other members of the bar or court personnel?

[p. 25] JUROR SOWERBY: Yes.

MR. PALMATARY: Do you feel you might have knowledge of this case or facts that may not come out in evidence in this case by virtue of your prior conversation?

JUROR SOWERBY: That is possible, yes.

MR. PALMATARY: Do you feel you could sit as a fair and impartial juror in this case having knowledge of these facts?

JUROR SOWERBY: I would hope that my legal education and seven years of experience would allow me to separate any rumors or gossip that I may have heard from any evidence that may be presented.

MR. PALMATARY: Mr. Sowerby, sitting as a juror, though, and not as an attorney, do you think that your having knowledge of these facts would have some impact?

JUROR SOWERBY: Honestly, I would make my best effort not to let it have any impact, and I don't think it would. Of course I suppose it could be possible.

MR. PALMATARY: Does anyone else have any knowledge of Mr. Napier or Mr. Lane or Mr. Crowe?

(NO RESPONSE)

MR. PALMATARY: Now I want to ask you about some witnesses that may be called to testify in this

case, and ask if any of you know those witnesses or know anything about them: a Barbara Shivers?

[p. 26] (NO RESPONSE)

MR. PALMATARY: Tonya Bennett?

(NO RESPONSE)

MR. PALMATARY: Faye Cassel – Mr. Sowerby?

JUROR SOWERBY: Tonya Bennett, a legal secretary, and Faye Cassel, who works in the clerk's office.

MR. PALMATARY: Yes.

MR. SOWERBY: I know them.

MR. PALMATARY: Grace Owens.

JUROR YARBROUGH: Grace Owens?

MR. PALMATARY: Yes.

JUROR YARBROUGH: Does she work at Adventure Travel?

MR. PALMATARY: No. She works at the law firm of Grayson Lane.

JUROR YARBROUGH: No, sir, that's not her.

MR. PALMATARY: Elise Hannah.

JUROR WILLIAMS: Yes, sir. They used to live right around the corner from us, and I work for the same company that she does, but we work in different departments.

MR. PALMATARY: Where do you live, Ms. Williams?

JUROR WILLIAMS: Well, we used to live on Hampton Point.

THE COURT: Ms. Stephens raised her hand, too, Mr. Palmatary.

JUROR STEPHENS: I know Elise.

[p. 27] MR. PALMATARY: Okay. Greg Lennox?

(NO RESPONSE)

MR. PALMATARY: Sidney Kushner?

(NO RESPONSE)

MR. PALMATARY: A Mr. Ronald Stack of Doctors' Laboratory here in Brunswick?

(NO RESPONSE)

MR. PALMATARY: Robert Bever, from North Carolina.

(NO RESPONSE)

MR. PALMATARY: Do any of you have a family member or are you employed by or work with the Department of Family and Children's Services or DEFACS, as it's called?

(NO RESPONSE)

MR. PALMATARY: The State of Georgia Child Recovery Unit, Child Support Recovery Unit?

(NO RESPONSE)

MR. PALMATARY: The Child Support Receiver's Office in conjunction with the clerk of this court?

(NO RESPONSE)

MR. PALMATARY: I will ask if any of you had heard either through the media or television about this case approximately a year ago?

(SHOWING OF HANDS)

Mr. Sowerby?

JUROR SOWERBY: Yes, I heard about it in the paper.

[p. 28] MR. PALMATARY: Ms. Logue?

JUROR LOGUE: In the papers, and also a lot of talk.

MR. PALMATARY: You had some prior knowledge, or you've heard talk about this case?

JUROR LOGUE: No, I've just heard people discussing it, because it was something different, I guess.

MR. PALMATARY: Have you formed any opinion?

JUROR LOGUE: I don't know.

MR. PALMATARY: Yes, ma'am?

JUROR DAVIS: I've just heard through the media.

MR. PALMATARY: Through the media?

JUROR DAVIS: Uh-huh. I haven't formed any opinion.

MR. PALMATARY: And your name is?

JUROR DAVIS: Joan Davis.

MR. PALMATARY: Yes?

JUROR WILLIAMS: Just through the media.

MR. PALMATARY: How many of you – Yes?

JUROR PATEL: Through the media.

MR. PALMATARY: How many in this panel (indicating) have any medical training? Mr. Patel of course –

MR. PALMATARY: Ms. –

JUROR TUCKER: I'm Janice Tucker.

MR. PALMATARY: Yes, Ms. Tucker, you're –

JUROR TUCKER: A registered nurse.

MR. PALMATARY: You work at the hospital; right?

[p. 29] JUROR TUCKER: Yes, sir.

MR. PALMATARY: Okay. Ms. Crosby, I believe?

JUROR CROSBY: Yes. I'm a registered nurse. I work for home health.

MR. PALMATARY: You work for who?

JUROR CROSBY: A home health, Healthmaster.

MR. PALMATARY: Okay. And in this panel back here? The gentleman on the end next to Mr. Sowerby?

JUROR BROOKS: Basic first aid program.

MR. PALMATARY: And where did you receive your training, sir?

JUROR BROOKS: Arkansas Law Enforcement Training Academy.

MR. PALMATARY: No other formal training other than just the advanced First Aid and Lifesaving?

JUROR BROOKS: No, sir.

MR. PALMATARY: Have any of you had any training or advanced courses in either botany, zoology or genetics, or any laboratory training in those areas? Mr. Sowerby?

JUROR SOWERBY: I have no formal training. However, I am very familiar with the principles of histo-compatibility and immunology that will be presented in this case.

MR. PALMATARY: Okay. Anything beyond the pharmacy level, sir?

[p. 30] JUROR PATEL: No.

MR. PALMATARY: Anyone else, in botany, zoology or genetics?

(NO RESPONSE)

MR. PALMATARY: How about statistics or higher math? Does anyone have – Yes, sir?

JUROR BROOKS: Basic statistics in graduate school.

MR. PALMATARY: And that was where; Arkansas?

JUROR BROOKS: Yes, and Clayton in Missouri.

MR. PALMATARY: Okay, and your name, sir?

JUROR BROOKS: Stephen Brooks.

MR. PALMATARY: Is that Creighton, in Nebraska?

JUROR BROOKS: Clayton, St Louis, Missouri.

MR. PALMATARY: Clayton. Thank you. And what is your occupation, Mr. Brooks?

JUROR BROOKS: I'm a training instructor at the Federal Law Enforcement Academy.

MR. PALMATARY: I believe Ms. Skelton asked this question. I think you all answered whether you are either paying or receiving child support. If not you, does any member of your family, of your immediate family, either a spouse, or a daughter or someone, do they pay or receive child support?

JUROR WILLIAMS: Yes, we pay.

MR. PALMATARY: Okay, I believe you've already [p. 31] answered that.

JUROR WILLIAMS: Uh-huh.

MR. PALMATARY: Mr. Sowerby?

JUROR SOWERBY: My sister receives child support.

JUROR BROOKS: (Hand raised)

MR. PALMATARY: You're Mr. Brooks?

MR. BROOKS: Yes, sir.

JUROR UTZ: My sister is supposed to.

MR. PALMATARY: Okay. Let me ask this panel, have any of you or any member of your family, close or immediate family, ever either brought or had brought against you a paternity case, any question about paternity? Yes, ma'am?

JUROR CROOKS: I have.

MR. PALMATARY: Did you bring the case?

JUROR CROOKS: Yes.

MR. PALMATARY: And your name is?

JUROR CROOKS: Cheryl Crooks.

MR. PALMATARY: Crooks, okay, and was that here in Glynn County?

JUROR CROOKS: Yes.

MR. PALMATARY: Did you use the State, or did you have a private attorney?

JUROR CROOKS: Private.

MR. PALMATARY: A private attorney?

[p. 32] JUROR CROOKS: Yes.

MR. PALMATARY: Anybody in this panel (indicating)?

(NO RESPONSE)

MR. PALMATARY: How many of you are married in this panel?

(SHOWING OF HANDS)

MR. PALMATARY: And in this panel, how many are married or have ever been married?

(SHOWING OF HANDS)

MR. PALMATARY: Over here, those that are not now, have you been?

(SHOWING OF HANDS)

MR. PALMATARY: How many of you have children?

(SHOWING OF HANDS)

MR. PALMATARY: And in this panel?

(SHOWING OF HANDS)

MR. PALMATARY: Thank you. Now I guess we get to the personal questions. I need to ask you about your feelings on either pro-life or pro-choice, sterilization, birth control. Does anyone in this panel have either any personal beliefs or any religious beliefs against birth control?

(NO RESPONSE)

MR. PALMATARY: How about sterilization? Are any of you –

[p. 33] THE COURT: Why don't you ask if anyone is opposed to it?

MR. PALMATARY: Is anyone opposed to birth control?

THE COURT: On this panel here (indicating), this panel?

(NO RESPONSE)

MS. SKELTON: Everyone is in favor of birth control on this panel? Is that correct?

(NO RESPONSE)

MR. PALMATARY: This panel back here? Who is opposed to birth control? Does anyone have any feelings or opposition to birth control?

(NO RESPONSE)

MR. PALMATARY: Does anyone of this panel, or any member of your family or immediate friends? Have they ever had any sterilization procedure as a method of birth control? Do you know anyone that's used sterilization? Yes?

JUROR DAVIS: Are you talking about using?

MR. PALMATARY: Yes, ma'am.

JUROR DAVIS: Like vasectomies? Is that what you're talking about?

MR. PALMATARY: Yes, or tubal ligation or any other form. You're all familiar with that. Does anyone have any objection to that form of birth control?

[p. 34] (NO RESPONSE)

MR. PALMATARY: How about on this panel?

THE COURT: What is the question?

MR. PALMATARY: Does anyone have any objection to sterilization as a form of birth control, either tubal ligation, vasectomy, or other types of surgical sterilization?

(NO RESPONSE)

MR. PALMATARY: Has anyone here not served on a jury before? How many? Is this the first time –

THE COURT: That's a question we won't go into.

MR. PALMATARY: Thank you. One other question. Ms. Utz, I think you said you had some prior knowledge of this case.

JUROR UTZ: No, not of this case, just of Mr. Tucker.

MR. PALMATARY: That's right. The neighbor, your neighbor. Do you feel that that knowledge would prevent you from acting fairly and impartially in this case? Could you totally remove that from your mind?

JUROR UTZ: No, because it's years of her –

THE COURT: Just answer yes or no.

JUROR UTZ: No, I don't think I could.

MR. PALMATARY: You could not be impartial?

JUROR UTZ: (Negative Indication)

MR. PALMATARY: I'd ask that she be excused for cause [p. 35] then, Your Honor.

THE COURT: Ms. Utz, I'll excuse you then. You do not have to report back to the jury room. You can just go. Thank you.

(JUROR UTZ WITHDREW FROM THE COURTROOM)

THE COURT: Anything else?

MS. SKELTON: No, Your Honor.

THE COURT: All right. I'll give you a couple of minutes to look over your jury list.

(SHORT RECESS)

THE COURT: Ladies and gentlemen, we'll call the names of the jurors who have been excused. Please remain seated until we have completed calling the names.

Will you all travel through verdict with as few as 10 or 11 if one or two become incapacitated? Ms. Skelton?

MS. SKELTON: Yes, Your Honor.

THE COURT: Mr. Palmatary?

MR. PALMATARY: We prefer 12, Your Honor.

THE COURT: All right. Twenty-eight, 29 and 30 jurors. Each side has one strike for one alternate.

(SILENT JURY STRIKES)

THE COURT: Call the names of the jurors that have been excused.

THE CLERK: Tamara Stephens, Cheryl Crooks, Vernon [p. 36] Pugh, Dawn Slowikowski, Pat Patel, Mabel Gibbs, Sybil Morris, Darlene Baggs, Jason Holmes, Vince Sowerby, Ivan Readdick, Mary Bowen, Anita Callaway, Wynell Logue.

THE COURT: Those of you whose names were called are excused. Thank you. You may go at this time. You do not have to go back to the jury assembly room.

Members of the jury, would you please have a seat in the jury box, please?

(COMPLIED)

THE COURT: Ladies and gentlemen, you've been selected as the jury to try this case, and the law requires that I give you the following instructions. More importantly, it requires that you follow these instructions. From this point forward, you cannot discuss the case with anyone whatsoever until you are in the jury room deliberating upon your verdict in the case. At that time you are only permitted to discuss the case among your fellow jurors. You cannot talk about it until your service as jurors has concluded. I know the natural tendency is, when you go home at night, some member of your household may want to know what happened in court today, and if anyone can influence you, certainly it's a member of your household, but they aren't hearing the evidence and they don't know what's taking place, so please tell them you can't discuss it until it's over. [p. 37] You can talk about it all you want to at that time. If anyone should attempt to talk with you about it, you must report it to me immediately.

The case will begin Wednesday morning at nine o'clock. I'll ask you to report back about five minutes till nine. Come up the front stairs and take a left down the hallway where you just came into the courtroom. Don't come in the courtroom. Just go straight through the chambers area here back into the jury room. Paul will be

outside, if you have any questions. He is the security bailiff assigned to you, and he will direct your attention, or Sergeant Taschotti, one, will be out front. One of the two of them will be out front so you all can find them. I'll ask you to go into the jury room, and Paul will give you further instructions at that time and answer any questions.

Before you leave, please write your name and all telephone numbers where we can reach you day and night on the pad in the jury room, so if it's necessary for us to call you or get in touch with you, we'll have your numbers where we can reach you. Be on time. It's a $50 fine if you're late and we have to wait for you. I'll see you Wednesday morning at five minutes till nine.

(THE JURORS WITHDREW FROM THE COURTROOM AT 12:18 P.M.)

[p. 38] THE COURT: I'll hear any argument on your motion on confidentiality, Mr. Palmatary.

MR. PALMATARY: Your Honor, this case by its very merits is going to involve medical procedures by both parties, it's going to involve their medical records, it's going to have testimony concerning the personal medical conditions of these parties. There has already been enough publicity on this case. As I understand the rumors, they're trying to sell tickets to the trial. I think that this type of case should be conducted with dignity and not made a spectacle. For that reason, we think that it would be in the best interests of the parties and the child that the case be held in a closed scenario or closed scene.

THE COURT: Ms. Skelton?

MS. SKELTON: I have no objection to Mr. Palmatary's motion, Your Honor.

THE COURT: I can assure you it won't be a spectacle as long as I am presiding. The only problem is that I have denied two others to two other attorneys and their families here based on the same motion within the last year, Mr. Palmatary. The act of confidentiality was passed in 1980, and a lot of the law has changed since '80, not specifically this, but the public's access to the courts has changed, so out of an abundance of caution I am [p. 39] going to deny the motion.

MR. PALMATARY: Your Honor, one additional, for the record. With regard to my prior motion of the array of jury and the number of men and the number of females, we'd like to object that the plaintiff in this case has systematically and arbitrarily used her peremptory strikes to strike almost all males from the array, leaving the jury constituted with a substantial majority of females versus males. I believe it's eight females and four males on the jury panel selected. As such, we would again renew our objection to the array and the panel we had to choose from.

THE COURT: Ms. Skelton, any response?

MS. SKELTON: No, Your Honor.

THE COURT: All right, it's noted.

MR. PALMATARY: Your Honor, we'd like to find out also what time counsel will have Dr. Bever present tomorrow so we can examine him. She indicated

that maybe she couldn't get him here until tomorrow night.

MS. SKELTON: I haven't had a chance to call him. I just called him and said don't get on the plane today. I left that message with him. Would any time after two or three o'clock be okay, Mr. Palmatary?

MR. PALMATARY: I'd prefer to have him in the morning, Your Honor. There won't be much time to talk.

[p. 40] THE COURT: Get him here as soon as possible.

MS. SKELTON: Yes, sir.

(RECESS – 12:21 P.M. MARCH 8, 1993)

CONVENE – 9:00 A.M., MARCH 10. 1993

THE COURT: Is there anything you wish to cover before we start?

MR. PALMATARY: Yes, Your Honor, the defense does.

THE COURT: All right.

MR. PALMATARY: Your Honor, I have a motion in limine that I'd like to file this morning with the Court, if it may please the Court. There are a couple of other motions we'd like to renew and continue also.

THE COURT: Go right ahead.

MR. PALMATARY: Your Honor, first of all, at this time we would like to renew our motion for a continuance. Dr. Bever was not made available to us until

approximately 3:15 yesterday afternoon. We covered a lot of material. It appears that he has conducted still another test after the one in February, one dated March the 5th that has, again, different findings. We have not had ample or opportune time in the last 12 or 13 hours to review those tests, and, as such, we think it's highly prejudicial and unfair to the defendant to be forced to go to trial on such short notice, so we renew our motion for a

* * *

[p. 84] Q Did you bring with you your file, Sonja Cassel's file?

A Yes, I did.

Q Are you the custodian of that file?

A Yes, I am.

Q Is that file a business record?

A Yes, it is.

Q Is that record kept in the normal course of business at the Department?

A Yes, it is.

Q Ms. Shivers, can you tell us from what period of time to what period of time Ms. Cassel received AFDC?

A Ms. Cassel applied for assistance on 11/28/90. At that time she was pregnant, and she applied for Medicaid right from the start, Medicaid for herself for the delivery of the baby.

Q Was she granted that?

A Yes, she was.

Q And was she asked who the father of her child was?

A At the time that she applied, when she came in for her interview, at that time she was asked at that time who was the father of the child.

Q And what was her response?

A She responded that Mr. Tucker, Mr. Alan Tucker, was the father but he did not acknowledge the child.

* * *

[p. 160] THE COURT: Overruled. He can answer the question.

Q What is the paternity index?

A I need to see that report that you took from me earlier.

Q I'm sorry, I apologize. I've got too many pieces of paper.

A Ms. Skelton, I have it. I'm sorry.

Q Great.

A The paternity index, based on the six DNA probes that I examined, is 206,624 to 1.

Q And what does that mean?

A It means that based on these six probes and on this evidence, that Alan David Tucker is 206,624 times more likely to be the biological father of Daniel Bryan Cassel than a random untested man that is not related in

the North American Caucasian population. So he's 206,624 times more likely to be the father of this child as compared to a random North American Caucasian man.

Q So what you're saying is – correct me if I'm wrong –

MR. PALMATARY: Your Honor, we object. She's leading the witness.

THE COURT: All right.

A Another way of saying this is the woman would have had to have had relations with 206,624 men during her gestation [p. 161] cycle to have had a child of this genetic makeup.

Q And have you formed an opinion based on your work as to the probability of paternity in this case?

A Yes. Based on the probability of paternity – and the probability of paternity, as I stated, takes in two factors, non-genetic evidence and the genetic evidence. The AABB recommends and the State of Georgia recommends that we use a .5 prior probability. At least that's what's in our contract. The .5 prior probability – a prior probability is non-genetic evidence – it can go anywhere from a zero to a one. A one is that if you actually saw the sperm entering the ovum under the microscope, was planted into the woman. A .5 is a neutral assessment. They had sex, they didn't have sex. The woman says that they had sex, the man says they didn't have sex. We are a neutral, unbiased party. That's why we put in a .5. Now .1 would be a situation where you've got many partners involved with this woman. She's had relations with many men. We'd plug in a .1. Zero would be one where they

had absolutely zero access to each other. They were physically separated would be a zero. So we can put in different numbers, if need be. On this report we put in a .5 because it's a neutral assessment, and it's along the guidelines of the AABB. But a .5 prior probability, the probability of paternity is greater than 99.99 percent that he is the father of the child, so that's the probability of paternity.

* * *

[p. 232] CROSS-EXAMINATION OF DR. DRURY BY MS. SKELTON:

Q Dr. Drury, would there be any reason for Mr. Tucker to have been concerned about birth control after February the 4th of 1990, as far as himself?

A I wouldn't think so.

Q You would not think so?

A No. After he was sterilized, no, he wouldn't be.

Q So he could have sexual intercourse without the worry of impregnating whoever he was having intercourse with?

A Yes, that's right.

Q It shouldn't have been a concern?

A It shouldn't have been a concern.

Q Okay. Dr. Drury, do you remember the dates of every surgical procedure you've performed in the last three years?

A Of course not.

Q How many do you think you've performed?

A Lots. I'll do an average of probably three or four or five a week.

Q All right, so let's say four a week for 52 weeks. That's 108 (sic) a year for three years. That's over 300 procedures in three years. Would that be right?

A I'm sure at least that many, maybe more.

Q Of those approximately 300 procedures, how many files have you lost?

[p. 233] A I haven't lost very many files, but the hospital has lost files. I was speaking with a psychologist awhile ago, they don't have many patients, but she's lost files. Files get lost. This file was lost totally unintentionally. I had the file, I thought, in a special place where I could keep it under my observation and not have to look for it when I was getting calls about it. The file got lost. It was a totally unforeseen and unplanned occurrence. You can make something of it if you want to, but there's nothing there.

Q Dr. Drury, you say you used your file that's now lost to help Mr. Palmatary and Mr. Tucker prepare two affidavits?

A Yes.

Q So you had it then?

A I had it then.

Q And then you came for a deposition at Mr. Palmatary's office on July 15th, 1992; is that right?

A That's right.

Q But you didn't have your file then?

A That's right.

Q And you don't have it now?

A And I don't have it now.

Q You're a personal friend of Alan's, are you not?

A Yes.

Q Did you all ever have lunch together?

A Yes.

[p. 234] Q Do You feel for him in this situation, Dr. Drury?

A Yes. I know he's been falsely accused.

Q Have you ever been falsely accused of the same thing?

A Yes, I sure was.

Q And for that reason –

A And the man who falsely accused me, or the people who did, they finally admitted it, and the real father is on the birth certificate.

Q So because you've been in his same position, you feel for him even more, don't you?

A No.

Q No?

A Let me tell you, I wouldn't lie for Alan or you or anyone here. This is what happened. Alan could not be the father of that child, period, paragraph.

Q Could you have given him this vasectomy, instead of in January of '90, in January of '91?

A No. I read it right directly out of my file to Mr. Palmatary and to Mr. Tucker.

Q Do you remember after you gave him or before you gave him the vasectomy any instructions you gave him about taking care of himself?

A Yes.

Q What do you think you told him?

A Well, I know that I told him to put an ice-bag on it, [p. 235] to go and take it easy; if he had any more pain than an aspirin would take care of, to call me. It shouldn't be that traumatic a procedure.

Q Did you ask him to be as inactive as possible?

A Yes.

Q Did you ask him not to lift anything, or do any kind of strenuous work, or run, or jog, or be on his feet a lot?

A Yes, I did all that. I asked him to stretch out and watch TV and do much of nothing.

Q And it's your testimony that you gave Mr. Tucker a vasectomy on January the 9th, is that right, of 1990?

A Yes.

Q And what day of the week was that according to this calendar?

A According to that calendar, it was a Tuesday.

Q Would you have thought that Mr. Tucker would go snow-ski two or three days later?

A I would have wished he hadn't, but I've known people to be more foolish than that and be more active than that. That is unwise, but it's certainly not unheard of, if that's your point.

Q Is it advisable?

A Oh, it's not advisable, but, you know, you're not in great pain. It's a simple procedure. You don't lose more than a drop or so of blood. That's no big deal. You shouldn't be [p. 236] terribly active, but, you know, some people, you just can't slow them down with a rope, hardly.

Q Would a seven- or eight-hour drive two or three days after a vasectomy have been a comfortable situation?

A It shouldn't have hurt, but it wouldn't be a wise thing to do. I mean you're just tempting it to hurt, but it shouldn't.

Q Do you know whether or not Mr. Tucker went skiing that next few days?

A I have no idea at all what Mr. Tucker did after that. I know he brought me a specimen, as I asked him to, in about a month or so.

Q So you don't have a record of that sperm check, either, do you?

A It was in the chart.

Q I see. Thank you, Doctor.

MS. SKELTON: That's all the questions I have.

REDIRECT EXAMINATION OF DR. DRURY

BY MR. PALMATARY:

Q One or two more questions, Doctor. First, where did you do this procedure?

A In my office.

Q Is that where most vasectomies are performed?

A Probably most are performed in offices.

Q And timewise, how long does the procedure take?

* * *

[p. 342] All right, you can retire and continue your deliberations.

(THE JURY RETIRED TO THE JURY ROOM TO CONTINUE DELIBERATING ITS VERDICT AT 2:51 P.M.)

EXCEPTIONS TO THE RECHARGE OF THE COURT:

THE COURT: I'll hear any exceptions by the plaintiff.

MS. SKELTON: None, your Honor.

THE COURT: Any exception by the defendant?

MR. PALMATARY: No, Your Honor.

THE COURT: All right, that case is recessed awaiting the jury verdict.

(RECESS AWAITING THE VERDICT – 2:52 P.M.)

(JURY PRESENT – 3:22 P.M.)

VERDICT OF THE JURY:

THE COURT: Mr. Muir, has the jury arrived at a verdict in the case?

THE FOREMAN: Yes, they have, sir.

THE COURT: And was it unanimous?

THE FOREMAN: Yes, sir.

THE COURT: Would you read your verdict, please, sir?

THE FOREMAN: We the jury find as follows: Alan D. Tucker is the father of Daniel Cassell [sic]. Yes.

We the jury unanimously decided we award child [p. 343] support as follows: Three hundred and forty-five dollars per month; Mr. Alan D. Tucker to provide medical insurance and pay fifty percent of all medical expenses not covered by insurance.

THE COURT: Is it dated and signed by you?

THE FOREMAN: Yes, sir.

THE COURT: All right. Be there any desire to inspect the verdict or poll the jury by either party?

MS. SKELTON: Not by the plaintiff, Your Honor.

MR. PALMATARY: No, your Honor, not by the defendant.

THE COURT: All right, would you file that with the clerk?

Ladies and gentlemen, I can discharge you from any further consideration of the case. If you want to talk about it now, you are at liberty to talk about it. Before you leave, though, I'd ask you, if you would, to step to the jury room for just a few minutes, and I'll see you in there before you leave.

(JURY OFFICIALLY DISCHARGED AT 3:26 P.M.)

THE COURT: Get me a judgment and I'll sign it, okay?

MS. SKELTON: Thank you, Your Honor. I have a motion to present to the Court relating to cost.

THE COURT: Okay, I'll entertain that in a few minutes after we take a break.

* * *

GLYNN COUNTY SUPERIOR COURT

MINUTES

CASE NO. 91-2151 JUDGES CODE: #2

CASSELL, DANIEL — PLAINTIFF
MARY SKELTON — COUNSEL FOR PLAINTIFF

VS

TUCKER, ALAN D. — DEFENDANT
CARROLL PALMATARY — COUNSEL FOR DEFENDANT

ALSO PRESENT:

GLENDA WORTH COURTROOM DEPUTY CLERK

BILL BURKE COURT REPORTER

3/8/93 — DATE
CR #1 — PLACE

Case called this date for JURY SELECTION with all parties being present and announced ready to proceed:

1. JANICE TUCKER 3/8 - 12:25 p.m.
2. FLOROELIZ CROSBY 3/10 - 4:30 p.m.
3. RICHARD MUIR 3/11 - 3:43 p.m.
4. MELANI WILLIAMS
5. BRENDA HOLT
6. JOAN DAVIS
7. JAMES HICKS
8. SHEILA DUNCAN

9. STEPHEN BROOKS

10. ANNE FOUCHE

11. RUSSELL AULTMAN

12. CHRISTINE YARBROUGH

ALTN 1. GREGORY HOSEY - 3/11 - 11:59 a.m. excused

SUPERIOR COURT

CIVIL JURY STRIKE SHEET

PLAINTIFF		DEFENDANT	
1. Reddick	#23	1. Crooks	# 5
2. Holmes	#20	2. Baggs	#19
3. Patel	#10	3. Stephens	# 2
4. Sowerby	#22	4. Bowen	#26
5. Morris	#12	5. Gibbs	#11
6. Pugh	# 6	6. Slowikowski	# 7

Cassel VS Tucker

CASE NUMBER: 91-2151 .

JUDGE:

( ) KNOX
(✓) TAYLOR
( ) TUTEN
( ) WILLIANS
( ) OTHER _____

PLAINTIFF'S ATTORNEY(s)

Mary Skelton .

DEFENDANT'S ATTORNEY(s)

Carroll Palmatary .

Court Reporter: Bill Burke . Clerk: Glenda Worth .

Deputy Sheriff: Tom . Date: 3/8/93 .

Logue 29

Calloway 28